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VOL. 97—INDIANA REPORTS.

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 97,

CONTAINING CASES DECIDED AT THE MAY TERM, 1884, NOT
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.*†

HON. ALLEN ZOLLARS.‡

HON. EDWIN P. HAMMOND.§

HON. WILLIAM E. NIBLACK.‡

HON. GEORGE V. HOWK.‡

***Chief Justice at the May Term, 1884.**

†Term of office commenced January 3d, 1881.

‡Term of office commenced January 1st, 1883.

§Appointed May 14th, 1883, to succeed Hon. WILLIAM A WOODS.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.‡

HON. WALPOLE G. COLERICK.§

• *** Chief Commissioner.**

† Appointed April 27th, 1881.

‡ Appointed May 29th, 1882.

§ Appointed November 9th, 1883.

(xx)

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.

CASES
ARGUED AND DETERMINED
 IN THE
SUPREME COURT OF JUDICATURE
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, MAY TERM, 1884, IN THE SIXTY-EIGHTH
 YEAR OF THE STATE.

No. 10,693.

THE CITY OF VALPARAISO ET AL. v. GARDNER.

CITY.—*Contract.*—*Ultra Vires.*—*Taxpayer.*—*Injunction.*—A taxpayer of a municipal corporation may maintain a suit to enjoin the corporate authorities from entering into an unauthorized contract.

SAME.—*Water Supply.*—*Creation of Debt.*—*Discretionary Power.*—*Limit.*—While the power of a city to contract for a supply of water for public use is, in a general sense, a discretionary one, it can not be so exercised as to create a corporate debt beyond that limited by law, nor to surrender or suspend legislative power.

SAME.—*Ministerial Act.*—The execution of a contract is a ministerial act, and may be enjoined if the contract is in excess of corporate authority.

SAME.—*Powers of Legislative Character.*—*Powers of a Business Nature.*—There is a distinction between powers of a legislative character and powers of a business nature.

SAME.—*Public Corporations.*—It is the inhabitants, and not the officers, who constitute the public corporations of the land.

SAME.—*Constitutional Law.*—*Meaning of Words.*—While courts must yield to the words of the Constitution, still, in determining what meaning they were intended to have, it is proper to consider the circumstances under which the provision was adopted and its purpose.

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The City of Valparaiso *et al.* v. Gardner.

SAME.—*Indebtedness of City.*—*Constitutional Limit.*—*Current Revenue.*—The limitation in the amendment to the Constitution, adopted in 1881, to the indebtedness of any political or municipal corporation, does not apply to water to be paid for as the water is furnished, provided the contract price can be paid from the current revenues as the water is furnished, without increasing the corporate indebtedness beyond the constitutional limit, or encroaching upon funds set apart to other purposes.

SAME.—*Current Expenses.*—The items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, constitute current expenses, payable out of current revenues.

SAME.—*Corporate Debt.*—Where the current revenues are sufficient to discharge all current expenses without increasing the indebtedness, there is no corporate debt incurred for such expenses.

From the Porter Circuit Court.

E. D. Crumpacker, H. A. Gillett and A. D. Bartholomew,
for appellants.

W. Johnston, for appellee.

ELLIOTT, C. J.—The complaint of the appellee avers that he is a resident taxpayer of the city of Valparaiso; that the municipal officers are about to let a contract to a water-works company for supplying the city with water for a period of twenty years, at an annual expense to the municipality of \$6,000; that the corporate indebtedness exceeds five per centum of the assessed value of the taxable property of the city and that there is no money in the treasury. The prayer of the complaint is for an injunction restraining the corporate authorities from entering into the contract.

The appellants answered, admitting that the appellee was a taxpayer; that the city was indebted in excess of two per centum of the aggregate value of the taxable property, and averring that the city has a population of over five thousand persons and is rapidly increasing in population; that it has no facilities for extinguishing fires except three cisterns, which are wholly inadequate, and that the safety of the city demands that the contract mentioned in the complaint be entered into and a supply of water secured; that the assessed value of taxable property, as shown by the assessment roll,

The City of Valparaiso *et al.* v. Gardner.

amounted to \$1,350,000; that from other sources than taxation the revenue of the city is \$2,500 per annum; that the ordinary current expenditures are less than \$6,000 per annum, and that the annual revenues of the city are sufficient to pay all the ordinary expenditures of the city and the water rent of \$6,000 per annum, besides providing for the accumulation of a sinking fund, as the law requires; that the intention was that the terms of the proposed contract should be so adjusted that when the water-works were completed and an instalment of rent earned, there would be money sufficient in the treasury to pay it, derived from current revenues, and to so fix the time of the payment of future instalments that they should be within the current revenues of the city, and yet leave money sufficient to meet all other corporate expenses.

A taxpayer of a municipal corporation may maintain a suit to enjoin the corporate authorities from entering into an unauthorized contract. *Sackett v. City of New Albany*, 88 Ind. 473 (45 Am. R. 467); *City of Madison v. Smith*, 83 Ind. 502; *Noble v. City of Vincennes*, 42 Ind. 125; 2 Dillon Munic. Corp. (3d ed.), sec. 922.

A city has authority to make contracts for a supply of water for the public use. *City of Vincennes v. Callender*, 86 Ind. 184. The authority is, in a general sense, a discretionary one, but it is by no means without limitation. The authority is so far of a discretionary character as to authorize the corporate officers to determine when the wants of the city demand a supply of water, and with this decision courts can not interfere. But the power can not be so exercised as to create a corporate debt beyond that limited by law, nor can it be so exercised as to surrender or suspend legislative power. While it is true that courts will not interfere with the exercise of discretionary powers, it is also true that they will interfere to prevent an abuse of discretion, or to prevent the corporate officers from transcending their authority. It is also true that courts will not interfere with mere matters of municipal legislation, but when the legislation is sought to

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be made effective by a ministerial act, then courts will interfere in cases where the act transcends the authority of the corporate officers. Dillon Munic. Corp., sections 308, 927, 1048. The execution of a contract is a ministerial act, and if the contract is one in excess of the corporate authority, its execution may be enjoined.

The important and controlling question which confronts us here is as to the power of the municipal corporation to enter into the contract described in the pleadings. We have no doubt that the corporation had authority to contract for a supply of water for a period of twenty years, and that the contract can not be overthrown solely on the ground that it is a surrender of legislative power. There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for houses, for gas, for water and the like, is neither a judicial nor a legislative power, but is a purely business power. The question is, however, so firmly settled by authority that we deem it unnecessary to further discuss it. *City of Indianapolis v. Indianapolis, etc., Co.*, 66 Ind. 396; Dillon Munic. Corp. (3d ed.), sections 473, 474, authorities n.

In 1881 an amendment to the Constitution was adopted, in which this provision is incorporated: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate, exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void." This provision received consideration in *Sackett v. City of New Albany*, 88 Ind. 473, but the question there presented and decided was very different from that which here faces us. The point decided in that case was that a city could not issue bonds for current expenses where there were no funds in the treasury and the existing indebtedness exceeded two

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per centum of the value of the taxable property of the municipality. There the question was not whether the claim which the municipal officers were about to pay in bonds was or was not a debt within the meaning of the Constitution; while here that is the question, so that we come to the decision of this case unfettered by any former adjudication of this court.

The question is a grave one, and not entirely without difficulty. If we hold that the contract to pay an annual water rent of \$6,000 during a period of twenty years creates a debt for the aggregate sum of \$120,000, and is a debt within the prohibition embodied in the Constitution, we should lay down a principle that would, in a great majority of instances, put an end to municipal government. If it be true that an agreement to pay a given sum each year for a long period of years constitutes a debt for the aggregate sum resulting from adding together all the yearly instalments, then it is extremely doubtful whether there is a city in the State that has authority to repair a street, dig a cistern or build a sidewalk, for nearly every city has contracts for gas and water supplies running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit of two per centum on the value of taxable property. We know, as matter of general knowledge, that water-works and gas-works require the outlay of enormous sums of money, and that such enterprises are not undertaken under contracts running for short periods of time. If the aggregate sum of all the yearly rents is to be taken as a debt within the meaning of the Constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the rigor of the words used, that the framers of the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities or to leave them without water or light. Nor are we to presume that the electors were ignorant of the existence, condition and necessities of our great towns and cities. On the contrary, we are to pre-

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sume that these things were known to the electors, and that they intended to foster the best interests of these instrumentalities of local government. An error frequently finds its way into trains of reasoning from the assumption, often made, that the officers are the corporation. This assumption is radically erroneous, for it is the inhabitants, and not the officers, who constitute the public corporations of the land. *Grant Corp.* 357; *Lowber v. Mayor, etc.*, 5 Abbott Pr. 325. *Clarke v. City of Rochester*, 24 Barb. 446. To deny the right to procure water and light is to deny it to the inhabitants of the towns and cities, and these form no inconsiderable part of the population of the State. We can not, therefore, by mere intendment declare that the electors of the State meant to lay down a rule that should practically take from the inhabitants of our cities the power to supply themselves with water or light. To reach the conclusion that they meant to do this, we must find clear warrant in the language of the constitutional provision itself. We agree that if it be found that the language used is clear and explicit, we must give it effect, no matter how disastrous the consequences may be. While it is our duty to yield to the words of the Constitution, still, in determining what meaning they were intended to have, it is proper to consider the circumstances under which the provision was adopted and the object it was intended to accomplish. *Cooley Const. Lim.* (5th ed.) 78, 79.

In view of the warring among the adjudged cases it is not easy to affirm that the word "debt" has a firmly settled meaning. In one case it was said, "But the compensation to this contractor was not a debt within the sense of this provision, until the service was performed and the contractor was entitled to be paid. It was, no doubt, an obligation, in some sense, from the time the contract was entered into, but it was not a debt in the popular sense" of the term. *Weston v. City of Syracuse*, 17 N. Y. 110. A similar definition is annexed to the word in the opinion of the court, written by the eminent jurist, Judge DENIO, in *Garrison v. Howe*, 17 N. Y.

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458. It was said in *Wentworth v. Whittemore*, 1 Mass. 471, "but whenever it is uncertain whether anything will ever be demandable by virtue of the contract it can not be called a debt." By the Supreme Court of California it was said: "A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened." *People v. Arguello*, 37 Cal. 524. In *Sackett v. City of New Albany*, *supra*, this language was used: "By 'indebtedness,' in this connection, we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement." Conceding that there are cases giving the word "debt" a somewhat different meaning from that affixed to it by these authorities, still they are sufficient to prove, at least, that the word can not be said to have a firmly settled meaning. It is not necessary for us to decide that the meaning given the word in the cases cited is that which the word invariably possesses, for it is sufficient for our purpose to assume that its meaning is not so fixed and definite as to forbid construction. The word used in the constitution is "indebted," but without ascertaining what the word "debt" means we can not affix a meaning to that word, for its popular meaning is "placed in debt," or as Worcester puts it, "being in debt." It is obvious that a corporation owing no debt can not be indebted.

Our leading purpose is, therefore, to ascertain what meaning the authors of the constitution intended the word "indebted" to have, and we address ourselves to its accomplishment. It is clear that if the city should fail to perform its contract, the recovery would be for damages for a breach of contract, and not the contract rate of compensation, and, therefore, it can not be true that the whole of the compensation is certainly demandable by the corporation with which it contracts. It may be that but a small part of even one year's compensation can be recovered. On the other hand, the failure of the water company to perform may put an end to the contract, and that would, of course, terminate all liability

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of the municipal corporation. There could be no action maintained against the city for the recovery of compensation under the contract without evidence that the water had been furnished, and this proves that there is no indebtedness until the water has been supplied in accordance with the terms of the contract.

The effect of the proposed contract is that the city shall be liable for water as it is furnished and not before. It is not until after the water has been furnished that there can be justly said to be a debt, for, while there might be a liability for damages, in case of a breach on the part of the city, there is certainly none under the contract until the city has received that for which it contracted. If it can pay this indebtedness when it comes into existence, without exceeding the constitutional limitation, then there is no violation of the letter, and surely none of the spirit of the Constitution. We are careful to say when the debt comes into existence, and not to say when it becomes due, for between these things there is an essential difference. The object to be accomplished by the amendment, the condition and necessities of our municipalities, as known to the authors of the amendment, and the just force of the language employed, authorize us to conclude that the inhibition of the Constitution does not apply to contracts for water to be paid for as the water is furnished, provided it is shown that the contract price can be paid from the current revenues as the water is furnished and without increasing the corporate indebtedness beyond the constitutional limit.

The adjudged cases sustain our conclusion. The cases upon which our case of *Sackett v. City of New Albany*, *supra*, is based, were decided by the Supreme Court of Illinois, and having once accepted the decisions of that court as authoritative, it is both consistent and logical to follow them so far as we can without yielding our own deliberate convictions. Happily, however, the decision of that court declares the rule to be that which we have here endeavored to prove the correct one.

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The case to which we refer is that of *East St. Louis v. East St. Louis, etc., Co.*, 98 Ill. 415, where the subject was much discussed; three of the members of the court wrote opinions, but there was no dissenting vote. In delivering the opinion of the court, SHELDON, J., set forth the provision of the Illinois Constitution and stated the argument of counsel to be that a contract similar to the one here under discussion violated the Constitution, and said: "We do not assent to the correctness of this view. The contract was for the furnishing of an article for nightly consumption by the city during a period of thirty years, fixing the price at which the article should be furnished. There was no indebtedness in advance of anything being furnished, but indebtedness arose as gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment, monthly, at the end of each month, the amount that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability—an indebtedness arises—and not before, as we conceive. Hence the amounts that might become due and payable under the contract in future years, did not constitute a debt against the city at the time of the entering into the contract, within the meaning of the Constitution." The decision in *Prince v. City of Quincy*, 105 Ill. 138, S. C., 44 Am. R. 785, does not overrule the case we have cited, but decides a different point from the one discussed in the extract quoted by us. The point really decided in *Prince v. City of Quincy*, *supra*, is stated with admirable precision and clearness in the head note prepared by the editor of the American Reports. The learned editor's statement is this: "Where the Constitution forbids any municipal corporation to become indebted beyond a certain amount 'in any manner or for any purpose,' that amount may not be exceeded even for necessary current expenses."

The clause in our Constitution is, in legal effect, and almost in words, the same as that of Iowa, and it is evident that it

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was taken from the Constitution of that State. It was said in the argument in *Prince v. City of Quincy*, 105 Ill. 215, that the clause in the Illinois Constitution was taken from that of Iowa, and if this be true, then the Illinois courts should have looked to the construction given by the courts of Iowa, for it is a familiar rule that where a clause is taken from the Constitution or statute of another State, it will be deemed to have the meaning given it by the courts of that State. *Langdon v. Applegate*, 5 Ind. 327, is authority upon this point, although it has long since ceased to be authority upon some of the points decided; and the cases of *Fall v. Hazelrigg*, 45 Ind. 576 (15 Am. R. 278), and *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 248, are in harmony with that decision upon the point to which we have cited it. Cooley Const. Lim. (5th ed.) 64. Turning to the decisions of the Iowa courts we find abundant support. In *Dively v. City of Cedar Falls*, 27 Iowa, 227, it was held that an obligation arising under a contract to pay for work when it was performed, does not constitute an indebtedness within the meaning of the Constitution, and this decision has the approval of Judge Dillon. 1 Dillon Munic. Corp. (3d ed.), section 135. The question was very fully discussed in *Grant v. City of Davenport*, 36 Iowa, 396, where it was held that a contract entered into by the city for the supply of water for a term of years, at an annual rental, is one relating to the ordinary expenses of the city, and that the annual rental is not an indebtedness within the meaning of the Constitution. One of the illustrations used in the course of the opinion is so apt that we quote it: "Suppose a man having a family to support is without other means to do it, except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore makes a lease for ten years at \$300 per year, or \$3,000 for the term, the rent being payable monthly, quarterly or annually. Has that man created an indebtedness of \$3,000?" The cases of *French v. City of Burlington*, 42 Iowa, 614, and *Burlington Water Co. v.*

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Woodward, 49 Iowa, 58, sustain the rulings made in the former cases. The case of *Scott Co. v. City of Davenport*, 34 Iowa, 208, decides that where bonds are issued binding the corporation to pay, an indebtedness is created, and the case is distinguished from *Dively v. City of Cedar Rapids*, *supra*. The cases of *State v. McCauley*, 15 Cal. 429, and *People v. Pacheco*, 27 Cal. 175, go very far to sustain the doctrines laid down by the courts of Iowa.

The Supreme Court of Pennsylvania, in *Appeal of the City of Erie*, 91 Pa. St. 398, held that an agreement binding the corporation to pay an annual rent for property created an indebtedness within the meaning of the Constitution, but in the course of the opinion said: "Many authorities have been cited for the defence, none of which seem to us to bear upon the point in issue. There is one, however, which we notice because of its general pertinency. In *Dillon on Municipal Corporations*, section 88, the learned author cites an Iowa case, involving the validity of a contract by a city for a supply of water, in which it is said: 'When a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the "incurring of indebtedness" within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts.' This, we hesitate not to say, is a sound constitutional interpretation, and in a similar case might well be adopted in the construction of our own Constitution. If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them, however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created. Had the defendant in the bill before us, instead of demurring, made answer that its annual revenues were sufficient, over and above the pay-

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ment of the interest of its indebtedness and the ordinary expenses of the city government, to meet the rent proposed to be paid, a very different case would have been presented for consideration. But the demurrer, admitting, as it does, the allegations of the bill, raises the single question of the power of the city to contract a new debt, notwithstanding its present indebtedness exceeds the constitutional limit, and this without reference to its resources or present ability to meet and pay the contract intended to be entered into." The case of *Coulson v. City of Portland*, Deady, 481, does not involve the question we are here discussing, for the court stated the question there decided to be, "Can the city lawfully issue interest coupons to railway bonds, payable half yearly through a period of twenty years, and amounting in the aggregate to over \$300,000?"

We have reviewed all the cases cited by counsel, and such others as we have been able to find upon a diligent search, and are satisfied that the conclusion we have reached is in harmony with the decisions made in cases where the question has been considered and decided, and is not opposed in principle to any of the cases bearing upon the general question.

We have assumed that the supply of water is necessary to the welfare of the inhabitants of the municipality, and that it constitutes one of the items of current expenditure essential to the welfare of the corporation, and this assumption rests upon the facts pleaded in the answer. This distinguishes the case, as is well shown in *Grant v. City of Davenport*, *supra*, from the cases in which property is purchased or subscriptions made to the capital stock of railroad or other corporations. It is the items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purposes even though the effect be to postpone judgment creditors. *Coy v. City Council*, 17 Iowa, 1; *Coffin v. City Council*, 26 Iowa, 515; *Grant v. City of Davenport*, *supra*. When the current revenues are

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sufficient to fully pay the current expenses necessarily incurred to maintain corporate life, there can not be said to be any debt. We do not assert that a debt may be created even for current expenses, if its effect will be to extend the corporate indebtedness beyond the constitutional limit, but we do assert that where the current revenues are sufficient to defray all current expenses without increasing the indebtedness, there is then no corporate debt incurred for such expenses. To illustrate our meaning, suppose a laborer is employed on the first day of April to render services on the first day of May, that on the day of the employment there is no money in the treasury, but on the first day of May, when the services are rendered, there will be more than enough yielded by the current revenues, there is in such a case really no debt. Again, suppose that on the first day of April gas is needed for that month, and that on each day of that month the current revenues are sufficient to pay each day's gas bill, there will be no debt even though there was not sufficient money to pay the month's account in the treasury on the day the contract was made. Such contracts do not create a debt prior to the rendition of the services in the one case, or to the furnishing of gas in the other; they simply devote to current expenses current revenues. While, as decided in *Sackett v. City of New Albany*, *supra*, the debt can not be made to exceed the constitutional limit even for current expenses, no matter how urgent, yet current revenues as they come in may be used to defray such expenses, and if they are sufficient for that purpose, then no debt is created.

If a bond, note, or other obligation is executed, then, doubtless, a debt is created, for such things constitute evidences of indebtedness, but that is not the case here. So, if the consideration of the contract is received at once, instead of being yielded in the future or at intervals, then it might be said that there was a debt, but where there is nothing owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary yearly expenses of

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the municipality, there will be no debt, if, when the thing is done or furnished there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim without encroaching upon other funds. This we understand to be the case made by the answer, and we think it a case not within the inhibition contained in the constitutional amendment.

If a different view be taken from that which we maintain, startling results would follow in the application of the principle to other cases. Take, for instance, a merchant having a large number of clerks employed for a year each, and at a fixed salary, could such a merchant in making out his tax-list deduct the aggregate amount of all the salaries computed to the end of the year, on the ground that it constituted an indebtedness? Take, again, the same supposed case, and would any one say that the merchant's solvency was to be determined by taking into consideration the aggregate of the salaries that would be due his clerks at the end of the year? Take, for another example, the case of a private corporation actively engaged in business, could it be pushed to the wall on the ground that it was insolvent, by evidence that it had contracted with a large number of men for a year's service, and that the aggregate sum due at the end of the year would be much greater than the value of its property at the opening of the year? Take still another example, a municipal corporation—and here there need be no supposition—with its officers (some of them with terms of several years), its policemen and its firemen, is it indebted, at the beginning of the year, for the grand aggregate of all the salaries to the end of all the terms? In the case of the merchant and of the private corporation, it certainly would be held, without hesitation or doubt, that if the current income or profit would discharge the obligations there would be no indebtedness; and this must be true of municipal corporations in cases where there will be money in the treasury, derived from current revenues, sufficient to pay for services rendered or things furnished, as part of the current corporate expenses, when the services are ren-

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dered or the things actually furnished. Expenses of such a character should be deemed incidental expenses of the corporate business, and not debts, and as long, at least, as the current revenues will pay these expenses without taking from funds devoted to other purposes by command of the corporate charter what properly belongs to them, there is no indebtedness within the meaning of the Constitution.

Judgment reversed, with instructions to overrule the demurrer to the answer, and to proceed in accordance with this opinion.

Filed Sept. 16, 1884.

No. 11,069.

WORLEY v. MOORE.

PLEADING.—Amended Complaint.—Date.—An amended complaint is to be held as stating the cause of action as it existed when the suit was instituted.

MISTAKE.—Voluntary Payment.—Where one party is trusted to make the calculation of interest upon notes due him, and he assures the debtor that the statement is correct, although it is in fact erroneous, and the statement is accepted, the mistake is a mutual one, and the creditor having received more than the sum actually due, he can be called to account for the excess.

CONVERSION.—Where one accepts money to be by him paid to a third party and converts a portion thereof to his own use, he is liable to the person from whom he received the fund and on whose account it was to be paid.

CONTRACT.—Rescission.—A contract can not be rescinded unless *in toto*; no part of the benefit can be retained, and the parties to the contract must be placed *in statu quo*.

INSTRUCTIONS.—Request.—Objection.—A party can not object to an instruction given at his own request.

SAME.—Answer to Interrogatory.—A judgment will not be reversed on account of an erroneous instruction, when it appears by an answer to an interrogatory that the jury were not misled.

CHANGE OF VENUE.—Argument of Counsel.—It is not proper for counsel to comment upon a change of venue, before the jury, but the error is not available if counsel desist on objection made.

From the Owen Circuit Court.

97	15
128	185
97	15
134	344
97	15
141	122
142	493
97	15
163	622
97	15
167	374

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J. R. East and *W. H. East*, for appellant.

J. H. Loudon, R. W. Miers, J. W. Buskirk and *H. C. Duncan*, for appellee.

ZOLLARS, J.—Action by appellee to recover from appellant an amount of money paid through mistake and fraud upon a settlement of accounts.

Upon a former appeal, the judgment was reversed upon the insufficiency of the complaint. Upon a return of the case to the court below, the complaint was amended, and the venue changed from Monroe to Owen county.

Upon the former appeal, the first paragraph of the complaint was held bad because it did not aver that appellant had notice of the mistake before the commencement of the action. *Worley v. Moore*, 77 Ind. 567. As amended, it is averred in this paragraph that when appellee discovered the mistake, he informed appellant of the fact, asked a correction, and demanded a repayment of the amount in excess of the amount actually due, which appellant refused. This, we think, is sufficient, and sufficiently fixes the time of notice and demand, as prior to the commencement of the action.

An amended complaint, in a case of this character, is not to be held as stating the cause of action as it exists at the time of such amendment, but as it existed when the action was commenced.

A further objection is now made to the first paragraph, that it does not state facts showing a mutual mistake in the settlement, nor, indeed, any mistake at all. And further, that if a mistake be conceded, the facts stated show appellee to have been guilty of such negligence as will defeat a recovery. The averments of the complaint, bearing upon these points, are substantially, that for a number of years there was an account existing between the parties; that appellee was indebted to appellant upon a number of interest bearing notes, upon which various credits and payments were and should have been endorsed; that in December, 1877, a

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settlement was had, when it was concluded that appellee's indebtedness amounted to \$3,450.85, which he then paid. The several notes, accounts, payments, the amounts found due, and the amounts in fact due, are stated in detail.

It is further averred that appellant alone computed the interest on the several notes with the partial payments, and assured appellee that he had made a careful and correct computation, and that the amounts stated were the correct amounts; that knowing that appellant was a proficient accountant, appellee reposed full faith and credit in his statements, and relied upon the correctness of the amounts stated and paid them, not then knowing of any mistake.

It is further averred that appellant made a mistake in the computation of the interest, and thus found the principal and interest due to be \$3,450.85, when in fact, upon a proper calculation of the interest, the amount due was \$2,000, and that both parties relied upon and acted upon the erroneous calculation in closing up the settlement, and making and receiving the payment.

These averments, we think, show a mistake, and as to the final settlement a mutual mistake. Having assumed to make the calculation of the interest, and having assured appellee in positive terms that the result was correct, and having received, upon the faith of the statements, a larger amount than was due to him, appellant is not in a condition to charge appellee with negligence in relying upon such statements. If the facts stated are true, as the demurrer admits, appellant can not in good conscience retain the money not due him. Our conclusion is fully supported by the cases of *Brown v. College Corner, etc., G. R. Co.*, 56 Ind. 110, and *Lewellen v. Garrett*, 58 Ind. 442.

An objection is made to the second paragraph of complaint, that it does not show a right of action in appellee. We think otherwise. The paragraph is not very specific, but states enough we think to show a right of action in appellee. The averments are, in substance, that in 1874 appellee was in-

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debted to one Woods upon two promissory notes; that appellant represented to appellee that Woods desired payment, and that if intrusted with the money he would give it to Woods and have it credited upon the notes; that appellee gave to him \$1,500 to be applied on the Woods notes, and that instead of giving the amount to Woods, and having it credited upon the notes, he converted \$600 of the amount to his own use, and refuses to repay it to the appellee. There is a further averment that appellee was compelled to pay that amount to Woods. This latter averment is the statement of a conclusion rather than of a fact, and may be disregarded in determining the sufficiency of the paragraph. We think that the other averments show that appellee constituted appellant his agent to pay over the money to Woods and have the amount credited upon the notes, and that instead of doing so he converted a portion of it to his own use. For the amount so converted he is liable to appellee, whether appellee has paid Woods or not. The paragraph clearly makes a case under the ruling in *Bunger v. Roddy*, 70 Ind. 26.

A third paragraph sets up fraud in the settlement on the part of appellant. To this complaint appellant filed answers and a cross complaint, asking for a rescission, etc. Under this cross complaint appellant testified, substantially, that at the time of the settlement mentioned in the complaint appellee was indebted to him in the sum of \$3,450, which, without mistake, was agreed upon as the amount; that appellee liquidated this amount by paying to appellant \$50 in money and conveying to him one hundred and ten acres of land, at the price of \$3,400; that he was induced to take the land at that price by the false and fraudulent representations of appellee, upon which he relied, that he was in debt to the amount of \$17,000, that being more than he was worth, and that unless he, appellant, took the land at the price fixed he would lose the most, if not the whole, of his claim against appellee; that the land was not worth over \$2,000; that he had taken possession of the land, paid the taxes, and improved and in-

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creased its value, and farmed it but little; that after this suit was commenced he had tendered to appellee a deed for the land, with an offer to pay all damages to the land, if any, and demanded a rescission of the contract and sale of the land, and a return to him of the notes and accounts surrendered upon the settlement and conveyance of the land; that he at no time tendered or offered to return to appellee the \$50 received from him.

As to whether or not appellee made any such representations as to the extent of his financial embarrassment, there is a conflict in the evidence.

The court below instructed the jury in the thirteenth instruction, and to the same effect in the eleventh and twelfth, that unless appellant, when he offered to rescind, offered also to return the \$50, he could not succeed upon his cross complaint. Appellant contends that in this regard the instructions were erroneous. We think otherwise.

The rule is well settled that if a contract is rescinded at all, it must be rescinded *in toto*; that a party can not rescind a contract and retain the whole or a part of the benefits of it, and that a contract can not be rescinded unless the parties can be placed *in statu quo*. *Scott v. Wallick*, 24 Ind. 124; *Gatling v. Newell*, 9 Ind. 572; *Watson Coal and Mining Co. v. Casteel*, 68 Ind. 476; *Patten v. Stewart*, 24 Ind. 332.

In the case before us, the evidence shows that appellant held a number of notes and accounts against appellee. Upon a settlement had, it was determined that a certain aggregate sum was due upon them. In payment of this sum, appellee paid \$50 in cash, and conveyed the land for a fixed price, which equalled the balance of the indebtedness. Upon this being done, the accounts and notes were surrendered to him. Appellant now asks that the conveyance of the land to him shall be rescinded, and that the notes and accounts shall be returned to him, he retaining the \$50. How shall the parties be placed *in statu quo*? Before the conveyance, appellant had the notes and accounts, and appellee had the \$50

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and the land. Appellant can not be entitled to the notes and accounts and the \$50 also. If he is to retain the \$50, clearly, appellee would be entitled to a credit for that amount on some of the notes or accounts. Upon which shall the credit be made? By whom and how shall that credit be made? Suppose that instead of \$50, \$1,000 had been paid in cash, and the balance by the conveyance of the land. If in such case appellant should be allowed to rescind as to the land, receive back his notes and accounts, and retain the \$1,000, how could appellee be protected by proper credits?

Who would have the right to say upon what notes or accounts a credit should be made? The parties would most likely disagree, and the court would have no right to determine. Thus there would seem to be an insurmountable difficulty in placing the parties *in statu quo*, if the contention of appellant be conceded. In view of the evidence as to the offer to rescind, and our conclusion as to that portion of the instruction under consideration, other objections urged against it are immaterial. Whether or not appellant might retain the \$50, and counter claim damages resulting from the land transaction, is another question.

Objections are also urged against the third and seventh instructions. These were given at appellant's request. He can not, therefore, be heard now to question their correctness.

Complaint is also made of the eighth instruction given by the court. In this the jury were instructed to find for the plaintiff upon the first paragraph of the complaint, if they should find from the evidence that in the settlement there was a mutual mistake as to the rate, calculation or amount of the interest on the notes and accounts, etc., or in counting any item of indebtedness twice, or in failing to give proper credits.

As related to anything in the first paragraph of the complaint, we find nothing in the evidence which shows any omission of credits or the counting of any item of indebtedness twice. In the instructions to the jury, the court should not direct their attention to evidence which does not exist.

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Such misdirection has often been held to be error. In the case before us, however, it affirmatively appears that the jury were not misled or influenced by the objectionable part of the instruction. To an interrogatory as to how the mistake in the amount of appellee's indebtedness occurred, they answered that it was by a mistake in the computation of the interest upon the notes and accounts. A judgment will not be reversed upon an erroneous instruction, when it thus appears that the jury were not influenced by it. *Stockton v. Stockton*, 73 Ind. 510; *Ferguson v. Hosier*, 58 Ind. 438.

There was no error in overruling appellant's motion for judgment upon the answers to the interrogatories. Without setting them out, it is sufficient to say that the answers are not such as to justify such a judgment.

A statement in argument to the jury, that one of the parties had caused the venue to be changed from the county where the parties reside, is not within the proper line of argument, but when the counsel at once desist upon objection being made, there is no available error. Neither can error be predicated upon the silence of the court, where there is no request for an admonition to the jury not to be influenced by the statement.

We can not reverse the judgment upon the evidence. We have examined it very carefully, and find that while it is not very conclusive, it at least tends to sustain the verdict.

It was assigned as a cause for a new trial, that the amount found by the jury is excessive. As we have already seen, a recovery is asked in the second paragraph of the complaint, on the ground that appellant had converted to his own use money which appellee had given to him to be applied and credited upon notes which appellee owed Woods. There is no evidence at all of such conversion. The evidence shows that appellant was the owner of or in some authoritative way connected with a bank. The Woods notes were left at the bank. Appellee paid into the bank \$1,500 for Woods; he says, with instructions to appellant to apply it upon the Woods notes, and have the proper credit made. After the

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payment, Woods made a credit of \$960.16 upon one of the notes, and checked out \$539.84, the balance. He claims to have applied that amount upon another indebtedness from appellee to him. If appellant was the agent of either party when the money was paid, he was the agent of Woods to receive it upon his notes. Appellee had the right to direct that the amount paid by him should be applied and credited upon the notes; notwithstanding he may have been otherwise indebted to Woods. If he thus made the payment and directed the credit, it was a payment of that amount upon the notes, whether the credit was endorsed upon them or not.

After the payment and the partial credit as above, Woods, for value, assigned the two notes to appellant, and they were included in this settlement with appellee. Apparently, appellant became the owner of the Woods notes after their maturity. If so, he took them subject to the payments. If appellee's testimony is correct, he took them with notice of the payment, and hence subject to it. In either event, appellee might have insisted upon the credit in the settlement with appellant.

If, by mistake or fraud, the proper credit was not allowed upon these notes, upon a proper case made, appellee might recover back the amount overpaid. Such a case is not made in the second paragraph of the complaint, which was intended to make a case upon this branch of the controversy, nor in either of the other paragraphs of the complaint. It is well settled that a party must recover, if at all, upon the allegations of the pleadings; he can not recover upon a state of facts different from those pleaded. *Boardman v. Griffin*, 52 Ind. 101; *Thomas v. Dale*, 86 Ind. 435.

The notes and accounts which appellee owed appellant at the time of the settlement are set out in the record in full. The amount due at that time is a matter of calculation. It is apparent that the jury included in their verdict the portion of the \$1,500 checked out by Woods, and not credited upon the notes, viz., \$539.84, and interest upon it from the

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date of settlement to the date of the verdict. This they should not have done, as it was not authorized by the pleadings and evidence. To avoid the error, appellee remitted \$539.84 of the verdict, and judgment was rendered for the balance—\$943.63. The remitment should have included the interest upon the \$539.84, included by the jury in the verdict. At six per cent., from the date of the settlement to the return of the verdict, that interest, if we are correct in our calculation, amounts to \$171.38. If within thirty days appellee shall remit that amount as of the date of the judgment, the judgment will be affirmed, at his costs, so far as made by this appeal. If he does not, the judgment will be reversed, with costs, and the cause remanded, with directions to the court below to sustain appellant's motion for a new trial.

Some other questions are discussed by counsel which we have carefully examined, and conclude that they constitute no sufficient reason for a reversal of the judgment. It would not be profitable to extend this opinion to set them out specifically.

Filed May 26, 1884. Petition for a rehearing overruled Sept. 20, 1884.

No. 11,277.

SHAW v. THE STATE OF INDIANA, FOR THE USE OF WHITMORE, COMMISSIONER.

97	23
170	581
170	613

DRAINAGE.—*Assessments for.*—*Complaint to Enforce Lien.*—In a complaint to enforce the lien of an assessment for the expense of drainage, the commissioner charged with executing the work must, in his complaint, state facts showing a substantial compliance with the statute from the filing of the petition to the last act necessary to be performed.

SAME.—*Jurisdiction of Circuit Court over Land in other Counties.*—Where lands affected by the proposed ditch, and embraced in the assessment therefor, are located in different counties, the court of the county in which the petition for the construction of the drain is filed, and where part of the land to be affected lies, has jurisdiction of all the lands assessed.

From the Grant Circuit Court.

Shaw v. The State of Indiana, for the use of Whitmore, Commissioner.

J. Brownlee, for appellant.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellee.

HAMMOND, J.—This was an action in the name of the State, for the use of Whitmore, commissioner of drainage, against the appellant, to enforce a lien upon real estate for an assessment against it for drainage under the act of April 8th, 1881; section 4273, R. S. 1881, *et seq.* The proceedings to establish the ditch to which the assessment related were had prior to the amendments of 1883, to the above act.

The appellant unsuccessfully demurred to the complaint, and then answered by the general denial. A trial by the court resulted in a finding for the appellee and a judgment on the finding over the appellant's motion for a new trial.

Section 4277, R. S. 1881, provides, among other methods for the collection of assessments, that the commissioner charged with the execution of the work, "may, if he so determine, bring suit in the name of the State of Indiana, for his use as commissioner of drainage, in any court of competent jurisdiction, to enforce a lien upon any tract or tracts of land for the amount * * assessed by him." This section as amended contains the same provision. Section 4, p. 178, Acts 1883. By section 4278, such commissioner was required to have recorded, in the recorder's office of the county, a notice of the assessments as the same were finally confirmed by the court, and the assessments made by him became a lien from the date of the recording of the notice.

In a complaint to enforce the lien of an assessment, facts must be averred showing a substantial compliance with the statute from the filing of the petition to the last act necessary to be performed in order that the commissioner charged with the execution of the work may demand and collect the assessment. The following cases have more or less bearing upon this point: *West v. Bullskin Prairie Ditching Co.*, 19 Ind. 458; *McIntire v. McLain Ditching Ass'n*, 40 Ind. 104;

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Smith v. Duck Pond Ditching Ass'n, 45 Ind. 94; *Combs v. Etter*, 49 Ind. 535; *Smith v. Duck Pond Ditching Ass'n*, 54 Ind. 235; *Cooper v. Arctic Ditchers*, 56 Ind. 233; *Gossett v. Tolen*, 61 Ind. 388; *Seits v. Sinel*, 62 Ind. 253; *Laughlin v. Ayres*, 66 Ind. 445; *Smith v. Clifford*, 83 Ind. 520; *Bogart v. Castor*, 87 Ind. 244.

The complaint in the present case fails to show a compliance with all the statutory requirements. Facts are not averred showing that a petition for the construction of the work was filed as required by law. It is not alleged that in the proceedings to construct the work, the court found that notice of the intention to present the petition had been given as provided by statute; nor that such petition was referred by the court to the commissioners of drainage; nor is it shown what action was taken thereon by such commissioners. It is not alleged that the commissioner, charged with the construction of the work, assessed from time to time upon the lands benefited, ratably upon the amount of benefits as adjudged by the court, such sums of money as were necessary therefor, not exceeding the whole benefits so adjudged upon any tract, nor that he required the same to be paid in instalments, not exceeding twenty per cent. per month, at such time as he fixed after notice as required by statute. Section 4277, *supra*. There may be other omissions in the complaint, but the specification of the above, together with our general statement of what a complaint in an action like the present should contain, will enable the appellee, upon a reconstruction of its complaint, to make averments showing that the proceedings were in conformity with the statute.

The demurrer to the complaint should have been sustained.

Another question, discussed by appellant's counsel, may arise again, and will therefore be considered. It appears from the appellee's complaint that the lands affected by the proposed ditch, and embraced in the assessments, are located partly in Huntington county and partly in Grant county. As we understand appellant's counsel, it is insisted that the

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circuit court of Huntington county, where the petition for the construction of the drainage was filed, did not have jurisdiction as to lands in Grant county.

As to proceedings in the circuit or superior courts for the drainage of lands, the statute clearly gives the court of the county in which the petitioner's lands are situated, jurisdiction as to all other lands affected by the proposed work though located in another county. Sections 4274, 4275, 4278 and 4284, R. S. 1881; also, sections 1, 2 and 5, Acts 1883, pp. 173-4 and 179.

No good reason occurs to us why it is not competent for the Legislature to confer upon circuit and superior courts the jurisdiction with which they are thus invested. Actions for the recovery or the partition of real estate, or for the foreclosure of mortgages, may be commenced in the county where the real estate or any part of it is situated. Section 307, R. S. 1881. The jurisdiction thus conferred has never, we believe, been questioned.

Where lands are so located, though in different counties, as to require for their drainage the same artificial channel, ditch or levees, or by removing obstructions from the same natural watercourse, or deepening, widening, straightening, or changing its natural channel, it is eminently proper, in the interest of convenience and economy, that the proceedings should be under the supervision of the same court, and we have no doubt of the constitutionality of the statute conferring this jurisdiction.

The judgment of the court below is reversed, at appellee's costs, with instruction to sustain the demurrer to the complaint and for further proceedings.

Filed Sept. 16, 1884.

Fleenor et al. v. Driskill et al.

No. 10,749.

FLEENOR ET AL. v. DRISKILL ET AL.

PARTITION.—Title.—Proceedings in partition create no new title, but, ordinarily, simply divide the land as held under existing titles into separate shares.

SAME. —Interlocutory Order.—It is by the interlocutory order that the rights and interests of the parties in suits for partition are adjusted.

SAME. —Order of Sale.—Appeal.—An order for the sale of land in a partition proceeding is a final order, from which an appeal may be taken.

JUDGMENT.—Reference to Record. If the entry of a judgment is so obscure as not to express the final determination of the court with sufficient accuracy, reference should be had to the pleadings and to the entire record when construing the judgment.

From the Washington Circuit Court.

D. M. Alsbaugh and J. C. Lawler, for appellants.

S. B. Voyles and H. Morris, for appellees.

NIBLACK, J.—On the 2d day of January, 1850, John Fleenor executed and published his last will and testament, the disposing part of which was as follows:

“*Secondly.* I will and bequeath to Henry Fleenor, Abraham Fleenor, Sarah Jane and Martha Fleenor, the children of Betsey Hensley, from whom I was divorced, the sum of one dollar each.

“*Thirdly.* I will and bequeath to my wife, Rebecca, one quarter section of land, to be selected by her at her own free choice and option from any of the lands that I may die seized of, to be chosen by her within one year after my death, for her support and maintenance, and that of the children she has or may have by me, during her life, and, at her death, the same I will and bequeath to the said children, share and share alike, and their heirs and assigns forever. This bequest is made in lieu of dower to my real estate. * * * But in case she shall not choose to accept of this bequest in lieu of dower in my real estate, then I give and bequeath said quarter section of land to the said children, without any

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limitation or intervening estate, absolutely forever, share and share alike; and furthermore, if my said wife, Rebecca, shall neglect to choose and designate such quarter section of land as above provided for, I authorize and request my executors, hereinafter named, to do it in behalf of said children, and their choice shall bind.

“Fourthly. I also give and bequeath to my said wife, Rebecca, all the household furniture I may be possessed of at my death, absolutely, together with the provisions on hand for the use of my family at my death.

“Fifthly. As to the rest, residue and remainder of my estate, real or personal, I will and direct that it be divided equally between my other children not hereinbefore named or alluded to, and to the children and heirs of those who, being dead, were in life my children, the same share that the parent, if alive at my death, would be entitled to, and to their heirs and assigns forever.

“Sixthly. I furthermore will and bequeath, order and direct, that if, in the opinion of my executors, the (quarter) section of land hereby to be designated and set off to the children of my wife, Rebecca, by me, will not afford them equal shares with my other devisees, they shall cause to be set off to them as much of my land as will make them equal shares in my estate.”

On the 19th day of September, 1853, the said John Fleenor died, leaving his will, executed and published as above, in full force, which, on the 22d day of the same month, was duly proven and admitted to probate. Within a few days thereafter Rebecca Fleenor, the widow, elected to, and gave notice that she would, take her share of the testator's real estate under the statute, and not under the will. The decedent was three times married, and, in that way, left three sets of children, constituting, in the aggregate, a numerous family, surviving him. The children which he had by the above named Rebecca, his last wife, and who survived him, were Rhoda Homocker, Henry Fleenor, Martha E. Driskill, William

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Fleenor and Francis M. Fleenor. The decedent died seized also of several tracts of land, covering together an area of near, if not quite, one thousand acres.

On the 23d day of November, 1853, Nicholas Fleenor, one of the decedent's children by his first wife, filed his petition in the common pleas court of Washington county, praying that partition might be made of the lands of which his said father had died seized, and making the widow and the remaining children and heirs at law of the decedent defendants to answer the petition.

Rebecca Fleenor appeared to the action and answered, reiterating her refusal to take under the will, averring title in herself, as such widow, to one undivided third part of the land described in the petition, and uniting with the petitioner in his demand for partition. Some of the children, being minors, answered by guardian *ad litem*, and the remaining defendants made default. No reply was filed to the answer of Rebecca Fleenor.

At a hearing of the cause, on the 3d day of April, 1854, the common pleas court made a finding that John Fleenor, the testator, had died seized of the land referred to in the petition; that the said Rebecca Fleenor was his widow, and had refused to take under his will; that the said Rebecca had neglected to select the quarter section of land devised to her children, and that the executors appointed by the will had refused to qualify as such executors; that, in continuing, the court said: "And it is found by the court that said Rebecca Fleenor, the widow of said deceased, is justly entitled to the one equal fourth part of said lands heretofore described." The court then proceeded to make a finding as to, and to define the interests of, all the other parties, concluding that partition ought to be made between the parties according to their said respective interests, and decreeing partition accordingly.

At the same term, the commissioners appointed to make partition made their report to the court, amongst other things, assigning and setting over to the said Rebecca Fleenor,

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one-fourth of the lands mentioned in the petition and decree of partition, to wit, the southwest quarter of section twenty-nine (29), in township three (3) north, of range four (4) east, with a yard running from the house forty feet east and sixty feet north and south, and also the right to use the water from the spring east of the house on said quarter section during her life; also, fifty-two acres off of the north end of the northwest quarter of section thirty-two (32) in the same township and range. The report of the commissioners, which also set apart a tract of land to the five children of the said Rebecca herein above named, was in all things approved and confirmed, the court adding as follows: "And it is ordered and decreed by the court that said widow have and enjoy the premises set apart to her for and during her natural life." Rebecca Fleenor, the widow referred to in this decree, went into the immediate possession of the lands assigned and set over to her as above set forth, and so continued until the time of her death as hereinafter stated, remaining sole and unmarried after the death of her then late husband, John Fleenor.

Previous to the month of November, 1863, Francis M. Fleenor died, unmarried and without issue, leaving his mother Rebecca and his brothers and sisters of the half-blood, as well as of the whole-blood, his only heirs at law. By partition proceedings, commenced on the 16th day of that month, thirty acres of the land of which the said Francis died seized were also assigned and set over to his mother, Rebecca, as one of his heirs at law. Afterwards, the said Rebecca conveyed the one hundred and sixty acre tract of land set apart to her in the first partition proceedings, and the thirty acre tract which came to her as lastly above stated, to her son William Fleenor, who has since come into the possession of those tracts of land. Before the death of Rebecca Fleenor, which occurred on the 12th day of August, 1878, Emeline C. Barnett became the remote grantee from her of the fifty-two acre tract of land set off to her, the said Rebecca, as the widow of John

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Fleenor, and went into possession of said tract claiming title in fee simple.

This action was commenced since the death of Rebecca Fleenor by a part of the lineal descendants of John Fleenor against others of his like descendants, including William Fleenor and Emeline C. Barnett, for partition of the lands set apart to the said Rebecca, first as the widow of her late husband, and afterwards as the mother and heir at law of Francis M. Fleenor, upon the theory that she held a life-estate only in those lands.

Upon a special finding of the facts, substantially as herein above recited, the circuit court came to the conclusion: *First.* That, under the final decree of the court of common pleas of Washington county, entered in the partition suit instituted by Nicholas Fleenor on the 23d day of November, 1853, as above stated, Rebecca Fleenor took and held a life-estate only in the lands assigned and set over to her by the proceedings in that cause. *Secondly.* That under the residuary clause of the last will and testament of John Fleenor, herein above set out, the title to the lands so assigned and set over to the said Rebecca, upon her death vested in the residuary devisees, that is to say, in the children of the first wife, naming those children, and the descendants of those who are dead, and declaring the share to which each is entitled. *Thirdly.* That Emeline C. Barnett has no interest in such lands. *Fourthly.* That William Fleenor is the owner in fee simple of the thirty acre tract of land conveyed to him by his mother, Rebecca Fleenor.

And it being made further to appear that the one hundred and sixty acre tract, and the fifty-two acre tract, described in the complaint, could not be divided without damage to the owners, it was ordered that those tracts be sold and the proceeds divided between the parties according to their respective interests as declared by the court.

It is conceded in argument that the circuit court reached the conclusion that Rebecca Fleenor took and held only a

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life-estate in the one hundred and sixty acre and in the fifty-two acre tracts of land, upon the ground that the final order in the partition proceedings by which those tracts were assigned and set over to her limited her interest in those tracts to, and defined it to be a life-estate only, and that such final order constituted an adjudication of her title to those lands binding upon her, as well as those claiming under her in this proceeding.

Title to real estate may be put in issue, tried and determined in partition proceedings, and when so put in issue, tried and determined, the judgment rendered is binding upon all the parties to the issue. Proceedings in partition, however, create no new title. Ordinarily, such proceedings simply divide the land as held under existing titles into separate shares, or, as may be otherwise stated, merely divert the common and flowing stream of title into separate channels. *Miller v. Noble*, 86 Ind. 527; 1 Washb. Real Prop. 59, section 60.

We see nothing in this case which takes it out of the general rule applicable to similar proceedings. In the first partition proceedings, no reply was filed to the answer of the widow setting up title in herself to one-third of the lands of which her husband had died seized. The facts upon which her claim of title rested were substantially admitted by the pleadings. The finding of the common pleas court was made and the interlocutory order of partition was entered upon the evident assumption that she was the absolute owner of one-fourth part of the lands of which partition was then demanded, and it is by the interlocutory order that the rights and interests of the parties in suits for partition are regularly adjusted and defined. 2 R. S. 1876, p. 345, section 9; R. S. 1881, section 1189; 2 Barb. Chancery Pr. 297; *Lease v. Carr*, 5 Blackf. 353.

The report of the commissioners, assigning and setting over to Rebecca Fleenor an estimated fourth part of the lands of her husband, was in substantial conformity with the interlocutory order. The restriction as to time placed upon her right to

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use water from the spring, referred to in the report, had plainly no reference to or connection with her estate in the lands set apart to her by that instrument. By the confirmation of the report she became entitled to hold the lands assigned and set over to her, in severalty and in fee simple, and the subsequent words, used in the final order, purporting to restrict her holding and enjoyment of the premises in question to her natural life, in analogy to the final entry in proceedings for the assignment of dower, then but recently abolished, were without any practical meaning as applicable to her estate in the land set off to her, and hence mere surplusage.

If the entry of a judgment be so obscure as not to express the final determination of the court with sufficient accuracy, reference may, and indeed ought to, be had to the pleadings, and the entire record, when construing the judgment. Freeman Judg., section 45; *Foot v. Glover*, 4 Blackf. 313; *Finna-gan v. Manchester*, 12 Iowa, 521; *Fowler v. Doyle*, 16 Iowa, 534; *Bell v. Massey*, 14 La. An. 831; *Hopper v. Lucas*, 86 Ind. 44.

So much of the interlocutory order as restricted Rebecca Fleenor's interest in the lands of her husband to one-fourth only was probably either the result of an inadvertence or of a clerical mistake, but no question is made upon the proceedings on that account, and, in consequence, nothing is before us on that subject.

Upon a careful review of the whole case, we are led to the conclusion that Mrs. Fleenor was not restricted to a life-estate in the lands set apart to her as the widow of John Fleenor, as held by the circuit court, but became and was the owner of those lands in fee simple after they were so set apart to her.

But it is objected that the judgment appealed from in this case was not a final judgment, within the meaning of section 632, R. S. 1881, authorizing appeals to this court, and that for that reason this appeal can not be sustained.

McCord v. Wright, Administrator.

It is admitted that an appeal will lie from an ordinary proceeding in partition after the commissioners have reported and their report has been confirmed. *Kern v. Maginniss*, 41 Ind. 398. A decree in partition for the sale of the lands, after it has been ascertained that they can not be properly divided, is as much a final disposition of the cause as the confirmation of the report of commissioners making partition of the property.

It has been well said, "That, if after a decree has been entered, no further questions can come before the court, except such as are necessary to be determined in carrying the decree into effect, the decree is final." Freeman Judg., section 36. Tested by that definition, the order for the sale of the lands in this case, was a final order from which an appeal to this court was properly prosecuted. *Ferguson v. State, ex rel.*, 90 Ind. 38.

The judgment is reversed, with costs, and the cause remanded with instructions to the circuit court to state conclusions of law, and to enter final judgment, in accordance with the views expressed in this opinion.

Filed Sept. 19, 1884.

No. 11,024.

McCORD v. WRIGHT, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Mortgage.*—*Widow's Share of Real Estate.*—*Application of Personal Estate.*—*Widow's Claim for Reimbursement.*—*Precedence over General Creditors.*—*Statutes Construed.*—B. died the owner in fee simple of four separate parcels of real estate, leaving C. as his widow. Each of the parcels was encumbered by mortgage thereon, in the execution of which C. had joined with her husband. The mortgages were foreclosed and the mortgaged real estate sold for the payment of the mortgage debts. The value of the mortgaged real estate, at the time of B.'s death, was found to be \$8,100, the one-third part of which real estate had descended to his widow, C., in fee simple, "free from all demands of creditors," except the mortgages thereon, in the execution of which she had joined with her husband. There was in the hands of W., the adminis-

97	84
148	289
148	290
148	291
97	34
168	129

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trator of the estate of B., the sum of \$4,500 in money, realized from the personal estate of B., to be administered, no part of which sum had been applied to the payment of the mortgages on the decedent's real estate, or on the share thereof which descended to C. as his widow. C. filed a claim for reimbursement for the value of her share of the real estate out of the moneys realized from the personal estate of B., in preference to his general creditors.

Held, that C., as widow, had an equitable claim against the estate of B. to be reimbursed the full value of her share of B.'s lands, which had been sold and conveyed away from her for the payment of his debts secured by mortgages thereon.

Held, also, that the claim of C. for reimbursement out of the moneys realized from the personal estate of B., and in the hands of his administrator, upon the facts of this case and the statutes of this State applicable thereto, takes precedence of, and is entitled to priority in payment over, the general debts of B. and the claims of his general creditors.

From the Marion Circuit Court.

W. Wallace and *L. Wallace*, for appellant.

J. M. Judah and *O. B. Jameson*, for appellee.

Howk, C. J.—The appellee's decedent, Benjamin R. McCord, was seized in fee simple, at the time of his death, of divers parcels of real estate in Marion county, which are described in appellant's complaint, and may be described in this opinion as numbers 1, 2, 3 and 4. Each of these parcels was encumbered by mortgages executed by the decedent, in his lifetime, and by the appellant, then his wife and now his widow, as security for his debts, amounting, in the aggregate, to a sum largely in excess of the actual cash value of each and all of such parcels of real estate. After the death of Benjamin R. McCord each and all of the aforesaid mortgages were foreclosed by the holders thereof, in suits against the appellant, as his widow, and his other heirs at law, for the amounts due upon the respective mortgage debts and for the sale of the mortgaged premises. Afterwards orders of sale were issued on such judgments of foreclosure, and by virtue thereof all of such parcels of real estate, including the appellant's share thereof as the decedent's widow, were sold by the sheriff of Marion county, without any intervention by

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the appellee as administrator of the decedent's estate to save, secure or relieve appellant's share of such real estate from the liens of the several mortgages and judgments of foreclosure. The sheriff's sales of all said parcels of real estate, including the appellant's share thereof as the decedent's widow, amounted in the aggregate to the sum of \$21,078.60, as shown by the sheriff's returns to the several orders of sale, of which sum the one-fifth part, or \$4,215.72, is claimed to have been the proceeds of the sheriff's sale of the undivided one-fifth part of all the said parcels of real estate, being the appellant's share thereof which descended to her as the widow of the decedent, at his death, "free from all demands of creditors" of the decedent, except the said mortgages thereon in the execution of which she had joined. There was in the hands of the appellee, as the administrator of the decedent's estate, the sum of \$4,500 in money, realized from the personal estate of the decedent, to be administered.

Upon the foregoing facts, which are substantially the same as those stated, at much greater length, in the appellant's complaint, she claimed that after the payment of the funeral expenses of the decedent, and of the expenses of his last illness and of the administration of his estate (her statutory allowance of \$500, as the decedent's widow, having been received by her), all the personal estate of the decedent, in the hands of the appellee to be administered, ought to have been applied by him to save and relieve the appellant's share of all the said parcels of the decedent's real estate from the liens of the aforesaid mortgages thereon; and that the said personal estate, not having been so applied at the proper time, ought now to be applied by the appellee to the reimbursement of the appellant for the sale as aforesaid of her said share of all the said parcels of the decedent's real estate; and the appellant asked for an order of the court directing the appellee as such administrator to make such application of the money of his decedent's estate, in his hands, to the payment of her said claim.

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Issues were joined upon the appellant's complaint by the appellee's answer in general denial, and were submitted to the court for trial. The court found generally, that the aggregate value of all the parcels of real estate, in the complaint described, at the time of the death of Benjamin R. McCord, and at the time of the sheriff's sales thereof, was \$8,100, and that the interest of the appellant therein was one-third, as against the decedent's creditors; that the personal assets of the decedent's estate, in the hands of the appellee as administrator, was then the sum of \$4,500, and the appellant was entitled to one-third thereof, after the payment of the costs of administration and of the expenses of the funeral and last sickness of the decedent, and that the residue of such personal estate should be applied to the other indebtedness of the decedent, as the court might direct.

Thereupon the court ordered that the appellee, as administrator, forthwith pay the appellant the sum of \$1,200, and that thereafter, under the further order of the court, he should pay the appellant such further sum or sums of money as, with the said sum of \$1,200, should amount to one-third of all the personal estate of the decedent remaining after the payment of the costs of administration and the expenses of the funeral and last sickness of the decedent, and after payment of the statutory allowance of \$500 to the appellant, as widow: "Provided, however, that the aggregate principal sums so to be paid said plaintiff, shall in no event exceed the value of one-third of said real estate, to wit, twenty-seven hundred dollars."

Neither the appellee nor the appellant was satisfied with the finding and order of the court in this cause; but each of them separately moved the court in writing for a new trial. Each of these motions was overruled, each of the parties excepted, and each of them has assigned errors in this court and is asking for the reversal of the order below. Without setting out either the errors or cross errors, and without especial reference thereto, we will consider and decide the prin-

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cipal and controlling questions presented by the record for our decision. We are of opinion that the facts stated in the appellant's complaint show an equitable claim or cause of action in her favor, against the money in the appellee's hands to be administered, sufficient to withstand the demurrer thereto. Under the provisions of section 2483, R. S. 1881, in force since May 6th, 1853, upon the death of her husband, Benjamin R. McCord, the appellant's share of his real estate, which could not be greater than one-third nor less than one-fifth of such real estate, according to its value, as against his creditors, descended to her in fee simple, free from all demands of his creditors. Her share of such real estate, it is true, was bound as security for such of her husband's debts as he had in his lifetime secured by mortgages thereon, in the execution of which she had joined; but none of his creditors, other than those secured by such mortgages, could directly or indirectly assert or enforce their demands against her share, under the statute, of his real estate. In *Perry v. Borton*, 25 Ind. 274, the court said: "The right of a widow, under our statute, to one-third of the real estate of her deceased husband is absolute against creditors, unless, by joining with her husband in a mortgage, she waives it. Such waiver can only operate in favor of the mortgagee; and other creditors can not surely reap advantages against her, from the fact that she has thus joined in a mortgage to one." Section 2483, *supra*. "To so hold, would not be to give her the share 'free from all demands of creditors,' as the statute requires. The whole estate, real and personal, except the share thereof given to the widow by law, must, if necessary, be applied to the payment of the debts of the deceased; and as between creditors, those who hold mortgage or judgment liens must be fully paid in preference to general creditors." 2 R. S. 1876, p. 534, section 109; section 2378, R. S. 1881.

There can be no doubt that it was the duty of the appellee, as administrator, under the statutes last cited, to apply the personal estate of his decedent in his hands to the pay-

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ment of the mortgages on his decedent's real estate, in preference to the general debts of the decedent. As the appellant's share of such real estate was merely bound as security for her husband's debts described in the mortgages, we think she had the right to demand that the administrator should so apply such personal estate, if possible, as to relieve her share of the real estate, or some part thereof, from the lien of the mortgages thereon. The appellee, however, made no application whatever of the personal estate of the decedent, in his hands as administrator, or of any part thereof, to the payment of the mortgages on the decedent's real estate, or on the appellant's share of such real estate; but he now has in his possession the whole of such personal estate, and he claims that the same should be distributed to the general creditors of the decedent, to the entire exclusion of the claim of the appellant thereon.

The claim of the appellant, upon the facts of this case, to be reimbursed fully for her share of her husband's real estate out of his personal estate, is not founded wholly, at least, upon the equitable doctrine of subrogation, and is not hedged in, therefore, by any of the rules applicable to that doctrine. The claim is founded on rules, both of law and equity, higher and more favored even than the doctrine of subrogation. This court has always held that the provision for the widow in the lands of her deceased husband, under our statute of descents, is a substitute for dower under the common law, and is to be equally as favored and protected by the courts as her former right of dower. "There be three things," said Lord Coke, "highly favored in law—life, liberty and dower." Co. Litt. 124, *b*. In *Kennedy v. Nedron*, 1 Dall. 415, the same view of dower is thus expressed: "Dower is a legal, an equitable and a moral right. It is favored in a high degree by law, and, next to life and liberty, held sacred."

In *Noel v. Ewing*, 9 Ind. 37, it was held by this court that the widow's provision in the lands of her husband, under our statute of descents, is, and was intended to be, a substitute for

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the widow's right of dower at common law. After quoting freely from the authorities, ancient and modern, for the purpose of showing that a dowress was a favorite of the law, and her right superior to that of creditors, speaking for the court, STUART, J., said: "In this doctrine, running through a period of several hundred years, and asserting a principle so congenial to natural equity, it is not dower itself which the law holds sacred. It is the purpose for which dower was reserved—it is the support of the widow out of the wealth she has helped to acquire, which the law favors. No matter what the name—whether dower or some other estate—they are all the same. The support of the widow is the end to be attained. The law of 1852 substituted a third in fee in lieu of a third for life. The courts must regard the substitute with the same favor; and administer it with the same liberality, extended to dower; and for the same reason—that the widow is a favorite of the law."

It will be seen, therefore, that the appellant's claim in the case in hand, that she is entitled, as against the general creditors of her deceased husband, to be fully reimbursed out of his personal estate for the value of her share of his lands which was sold by the sheriff for the payment of his mortgage debts, is a claim highly favored both in law and equity. Although analogous, in some particulars, to a claim for subrogation, yet the doctrine which supports the appellant's claim, and under which she has the right to have it considered and passed upon by the courts, is superior to and more favored than the doctrine of equitable subrogation. Her claim is founded in natural equity, and it was not necessary to its assertion and enforcement against the personal estate of the decedent, in the hands of the appellee to be administered, that she should first pay the balance due under the mortgages, or on judgments against the decedent. She is not asking in this case to be subrogated to the rights of either the mortgage or judgment creditors of the decedent. If she were seeking relief by subrogation, then the rule invoked by the appellee.

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that the creditor's entire debt must be paid before the surety can claim to be subrogated to the rights of the creditor, would be applicable. See *Vert v. Voss*, 74 Ind. 565. The mortgage creditors had exhausted the real estate of the decedent, mortgaged to them respectively, and if there remained any unpaid balance of their respective debts, as to such balance they occupy no better position than the general creditors of the decedent. Neither they nor the judgment creditors of the decedent had any specific lien upon his personal estate. We conclude, therefore, that the claim of the appellant to be reimbursed for the value of her share of the decedent's lands, which descended to her as his widow, free from the claims of his creditors, and which was sold by the sheriff for the payment of his debts, is a valid claim against the personal estate of the decedent, in the hands of the appellee as his administrator, in preference to the claims of his general creditors; and that such claim is founded, not upon the doctrine of subrogation, but upon the higher and more favored equities, which protect the share of the widow in the lands of her husband from the claims of his creditors. *Morgan v. Sackett*, 57 Ind. 580.

Appellant's counsel also insist that the value of the appellant's share in the lands of her husband was conclusively determined by the amounts bid for the lands at the sales thereof by the sheriff, as shown by his returns to the orders of sale; and that the trial court erred in the admission of oral evidence of the actual value of the lands at the time of her husband's death. There was no error, we think, in the admission of this evidence. The court found, upon the evidence, that the actual value of the decedent's lands, at the time of his death, amounted to the sum of \$8,100. Upon this finding the appellant, as the widow of the decedent, was entitled to the one-third part in value of his lands, "free from the demands of creditors." Upon the basis of this finding, and the view we have taken of the appellant's claim, the court ought to have allowed her, to reimburse her for the one-third

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part in value of her husband's lands, the sum of \$2,700, to be paid out of the personal estate of the decedent, in the hands of the appellee as administrator. Error in the assessment of the amount of appellant's recovery, in that it was too small, was one of the causes assigned for a new trial in her motion therefor. This cause for a new trial was well assigned, and for this cause we are of opinion that a new trial ought to have been granted. Our conclusion is, therefore, that the court erred in overruling the appellant's motion for a new trial. We have found no other error in the record.

The judgment is reversed, with costs, and the cause remanded for a new trial, and for further proceedings not inconsistent with this opinion.

Filed May 10, 1884. Petition for a rehearing overruled Sept. 18, 1884.

No. 11,255.

THE WESTERN UNION TELEGRAPH CO. v. KILPATRICK.

SUPREME COURT.—*Assignment of Errors.*—*Waiver.*—A specification in an assignment of error, not discussed in brief, is treated as waived.

SAME.—*New Trial.*—The action of the court below in granting a new trial will not be reviewed unless it plainly appears that injustice has been done.

SAME.—*Instructions.*—Giving or refusing instructions can not be assigned as error, but is properly embraced in a motion for a new trial.

SAME.—*Verdict.*—*Evidence.*—If there be evidence tending to sustain the verdict, the Supreme Court can not consider its sufficiency.

PLEADING.—*Proof.*—*Time.*—*Materiality.*—Time is not in itself ordinarily material, but may be so as a means of identifying a particular transaction and limiting the damages to the injury caused thereby.

SAME.—*Evidence.*—*Telegraph.*—Where a complaint to recover the statutory penalty for failing to promptly send a telegraphic dispatch alleges that the dispatch was sent in March, it is not error to permit witnesses to prove that it was sent in January.

From the Superior Court of Tippecanoe County.

J. A. Stein, for appellant.

F. B. Everett, for appellee.

97	43
134	004
97	42
146	634
97	43
152	421
97	42
156	324

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BICKNELL, C. C.—This was an action by the appellee against the appellant to recover the statutory penalty of \$100 for failing to transmit promptly a certain telegram, and also \$7.50 for special damages sustained by such failure.

The complaint averred the receipt of the message at Dayton, in Tippecanoe county, by the defendant's agent there, at ten o'clock A. M., to be sent to Mrs. Dr. Pierce, who lived within a mile from the defendant's office in Lafayette, and eight miles from Dayton, and that said defendant negligently failed to send said message until four o'clock in the afternoon of the same day; that Mrs. Pierce was a physician, who had been attending the sick wife of the plaintiff, and that the message notified said physician that the plaintiff's wife was dead, in order that no more visits should be made; that, in consequence of the failure to send the message promptly, it did not reach Mrs. Pierce in time to prevent such visit, as it ought to have done and would have done, if promptly sent; that such visit was made, for which the plaintiff had to pay \$7.50. Wherefore, etc.

A demurrer to the complaint for want of facts sufficient was overruled. The defendant answered by a general denial. The cause was tried by a jury, who returned a verdict for the plaintiff for \$7.50.

The plaintiff moved for a new trial, alleging that the verdict was not sustained by sufficient evidence, and was contrary to the evidence, and was contrary to law. This motion was sustained and the defendant excepted.

At the second trial, the jury returned a verdict for the plaintiff for \$107.50. The defendant moved for a new trial; this motion was overruled; judgment was rendered on the verdict; the defendant appealed. The errors assigned are:

1. Overruling the demurrer to the complaint.
2. Sustaining the plaintiff's motion for a new trial after the first verdict.
3. Refusal of instructions asked for by the appellant, and giving certain instructions in lieu thereof.

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4. Overruling the defendant's motion for a new trial.

In this assignment of errors the appellant prays that the judgment be reversed, and that the court below be instructed to enter up judgment on the verdict rendered on the first trial, and that all subsequent costs be taxed against the appellee.

The first of the foregoing specifications of error is regarded as waived, because it is not discussed in the appellant's brief.

The second specification of error can not be sustained, because, in general, the action of the court below in granting a new trial will not be disturbed in this court, unless it plainly appears that injustice has been done, and this does not appear in the present case, because the evidence given on the first trial is not in the record. *Nagle v. Hornberger*, 6 Ind. 69; *Hust v. Conn*, 12 Ind. 257; *Hill v. Goode*, 18 Ind. 207; *Collingwood v. Indianapolis, etc., R. W. Co.*, 54 Ind. 15; *Fitzpatrick v. Papa*, 89 Ind. 17.

The third specification of error presents no question. The matter of it belongs to the motion for a new trial. *Breckinridge v. McAfee*, 54 Ind. 141; *Higham v. Warner*, 69 Ind. 549.

As to the fourth specification of error, the motion for a new trial presented the following causes therefor, to wit:

1. The verdict is contrary to law.
2. It is not sustained by sufficient evidence.

3. Error of law occurring at the trial, as follows: (a) In allowing the plaintiff to prove by the witness Goldsberry, and by Mrs. Fifield, and by Kellenberger, that the message was left for transmission on January 29th, 1881, when the complaint stated that the message was left for transmission on the — day of March, 1881. (b) In refusing to give the following instruction asked for by defendant, viz.: "This action is founded on a telegraphic dispatch, which it is alleged was left for transmission on a day of March, 1881. Proof must correspond with the time as stated in the complaint, and the plaintiff can not recover for the negligence or default of the defendant on a dispatch left for transmission

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on the 28th or 29th day of January, 1881.” (c) That the court erred in the whole and every part of the following charge given to the jury: There is a bill of exceptions containing this charge given, but as the appellant’s counsel in his brief points out no error in it, and does not mention it, the general allegation of error therein must be regarded as waived. It is therefore not necessary to repeat here the charge alleged to have been given.

As to the instruction alleged to have been refused, it was held, in the case of *Kortz v. City of Lafayette*, 23 Ind. 382, that time is not in itself material ordinarily, but may be material as a means of identifying a particular act from which an injury is alleged to have resulted, and as limiting the damages claimed to the injury caused by that particular act; but even in criminal cases the State is not, ordinarily, bound to prove the precise time at which the alleged offence was committed. *Collins v. State*, 58 Ind. 5. The particular act may be identified without proof of the precise time alleged, and in this case, as the court, in the charge given, told the jury that “the plaintiff could not recover for any other dispatch than the one he had charged in the complaint,” and as the dispatch was fully identified by the evidence, there was no error in refusing the charge requested; and there was no error in permitting the witnesses to prove that the dispatch was sent in January, and not in March, as the complaint alleged.

As to the other reasons for a new trial, which call in question the sufficiency of the evidence, there was evidence tending to sustain the verdict, and, therefore, the verdict can not be disturbed on this ground. *Indianapolis, etc., Co. v. Tucker*, 89 Ind. 601. And it was not contrary to law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby affirmed, at the costs of the appellant.

Filed April 23, 1884.

Cushman *et al.* v. Gephart.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellant's counsel says, "Waiving all other points, I submit that the court below should have set aside the verdict as not sustained by sufficient evidence."

But the only question for this court in such cases is, was there evidence tending to sustain the verdict? In the present case there was such evidence; therefore the verdict can not be disturbed. *Ft. Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition is overruled.

Filed Sept. 20 1884.

No. 10,925.

CUSHMAN ET AL. v. GEPHART.

EXECUTION.—*Proceedings Supplementary to.*—*Complaint.*—*Return of Execution for want of Property.*—*Third Party.*—*Statute Construed.*—The remedy of proceedings supplementary to execution, given by statute, is, in many respects, a substitute for a creditor's bill, and the complaint should show some facts rendering such proceedings necessary. The return of an execution unsatisfied must, under section 815, R. S. 1881, be alleged, and this will be sufficient cause for the proceedings under that section. To sustain such proceedings against third parties, under section 819, the complaint must show either an execution returned *nulla bona*, or, if the execution is not returned, that the execution defendant has not other property subject to execution sufficient to satisfy the judgment.

SAME.—*Execution Defendant.*—Where the execution defendant is charged with having property subject to execution in the county, which he refuses to apply, and his debtor is also made a party, he may contest the sufficiency of the allegations.

SAME.—*Description of Property.*—Where the only attempted description of the property sought to be reached is, that the indebtedness "is large," the complaint, perhaps, is insufficient for this cause.

VOLUNTARY ASSIGNMENT.—*Benefit of Creditors.*—*Preferences.*—*Fraud.*—*Statute Construed.*—Section 2662, R. S. 1881, only provides for a general assignment of all a debtor's property for the benefit of all his creditors, and when that is attempted the statute must be complied with; but assignments by a debtor for the benefit of a part of his creditors, in order to be held void, must be actually fraudulent. This statute does not prevent preferences in good faith of one creditor over another.

97	46
125	63
127	309
97	46
137	248
97	46
145	605
146	552
147	62

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From the Wayne Circuit Court.

C. C. Binkley, D. W. Chambers and J. S. Hedges, for appellants.

C. H. Burchenal, for appellee.

FRANKLIN, C.—Appellee commenced proceedings supplementary to execution against appellant Cushman, alleging that Haynes, Spencer & Co. was indebted to said Cushman.

A demurrer was overruled to the complaint, and answers were filed denying the alleged indebtedness, and in addition thereto Haynes, Spencer & Co. filed a petition setting forth certain facts, which petition substantially stated that before the commencement of these proceedings, it (being a corporation) had purchased lumber of said Cushman of the value of \$1,293.95, which it had not paid; that before notice of these proceedings was served upon it, notice was given to it that said Cushman had assigned the account for said lumber to one Binkley for the use of Daniel W. Bouslog and Riley Chamness, and asking that said Bouslog and Chamness be required to interplead with said appellee, to determine who is entitled to the proceeds of said lumber. Bouslog appeared and set up an indebtedness to him from appellant Cushman in the sum of \$996, for the same lumber which he had previously sold to said Cushman, and the assignment by Cushman to Binkley, for his use, of the account on Haynes, Spencer & Co.; that the assignment of said account, the reception thereof by Binkley for his use, and his acceptance of the arrangement, were all before the commencement of these proceedings. There was no appearance for Chamness.

There was a trial by the court; at the request of Cushman the court made a special finding, and stated its conclusions of law. Appellants moved the court to correct its special finding, which was overruled; they then excepted to the conclusions of law, and, over a motion for a new trial, judgment was rendered for the appellee.

Cushman and Bouslog have appealed, making Haynes,

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Spencer & Co. a co-appellant. The following errors have been assigned, jointly and severally :

- 1st. In overruling Cushman's demurrer to complaint.
- 2d. Error in conclusions of law.
- 3d. Overruling motion to correct special findings.
- 4th. Overruling motion for a new trial.

The substance of the verified complaint is as follows: On the 8th day of October, 1877, the plaintiff recovered a judgment in the circuit court of Delaware county, Indiana, against said Cushman for \$937.99, which remained due and unpaid, then amounting to \$1,229.51. On the 14th day of December, 1882, an execution was issued thereon to the sheriff of Wayne county, in which county said Cushman then lived, which said execution was wholly unsatisfied, and said Cushman had property at said county which he wrongfully refused to apply to the payment of said judgment, but which can not be reached or levied on by such execution, and that said Haynes, Spencer & Co., a corporation located and doing business in said county, was indebted to the said Cushman in a large amount, to plaintiffs unknown, but which, together with all other property claimed by said Cushman as exempt from execution, exceed the amount of property so exempt by law from execution. Wherefore, etc.

The demurrer to the complaint is for the want of sufficient facts.

The remedy of proceedings supplementary to execution, given by statute, is in many respects a substitute for a creditor's bill; and a complaint, in order to be sufficient, ought to state some facts showing a necessity for resorting to these extraordinary proceedings. *Burt v. Haettinger*, 28 Ind. 214.

The 815th section, R. S. 1881, authorizes such proceedings against the execution defendant when there has been a return of the execution unsatisfied. Under this section it would certainly be necessary to aver such a return of the execution, and such a return would be a sufficient reason for the supplementary proceedings. The 816th section provides for similar

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proceedings before the execution is returned and while it is in the hands of the sheriff. The 819th section provides that "after the issuing or return of an execution," such proceedings may be had against third parties who are indebted to the execution defendant, or may have property in their possession belonging to him.

It seems to us that, in order to maintain these proceedings, the complaint ought to show, either that the execution had been returned *nulla bona*, or, if not returned, that the execution defendant did not have within the county other property subject to execution sufficient to satisfy the execution.

In the case of *Dillman v. Dillman*, 90 Ind. 585, it was held that in proceedings supplementary to execution, if the affidavit failed to show some necessity for the application, it was insufficient. But it is insisted by appellee that appellant Cushman, the execution defendant, has no such interest in these proceedings as enables him to contest these questions.

This complaint is based upon both the last named sections, and includes the execution defendant and his debtor. This court has frequently held that in such proceedings against the execution defendant's debtor, the execution defendant is a necessary party. But in this case the plaintiff has made him a necessary party by charging him with having property in the county subject to execution, which he refuses to appropriate in the payment of the judgment, and calling upon him to answer as to such property. Under such a complaint appellee is certainly estopped from denying appellant Cushman's interest in the matters in controversy.

It will be observed that the phraseology of the 816th section, in relation to the affidavit required from the plaintiff or other person in his behalf, is, that it shall be to the effect, etc. It does not specify the language to be used, or, perhaps, specify all the facts to be stated in the affidavit; but it does require the plaintiff to give in the affidavit a description of the property sought to be reached. The only pretended descrip-

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tion of the property sought to be reached in this case is, that the indebtedness "is large." The plaintiff was certainly as competent to state some amount and the nature of the indebtedness owing to the execution defendant as he was to state that it, with other property owned by him in the county, was more than the law allowed as exempt from execution.

We think this complaint is insufficient, because it does not show any necessity for the proceedings, and, perhaps, for the reason that it does not contain a sufficient description of the property sought to be reached.

It is also insisted that the conclusions of law are erroneous. It is perhaps advisable that this question should be decided here.

The substance of the special findings is as follows: Plaintiff recovered judgment against Cushman for \$937.94 in the Delaware Circuit Court October 8th, 1877; that on the 14th day of December, 1882, said judgment was unsatisfied, and the plaintiff caused execution to issue thereon to the sheriff of Wayne county (but it is not stated when it came to the sheriff's hands); that this proceeding was commenced December 16th, 1882, and notice thereof served upon Cushman on that day; that on the 15th day of December, 1882, the defendant Haynes, Spencer & Co. was indebted to said Cushman in the sum of \$1,223.63, which was then due; that on said 15th day said Cushman "executed to his attorney, Charles C. Binkley, an instrument, which by its terms assigned to him the said indebtedness of Haynes, Spencer & Co. to said Cushman in trust, to pay to said defendant Bouslog certain alleged indebtedness to him therein described, and also a certain other indebtedness in said instrument described, the whole indebtedness amounting to the sum of \$1,396.76;" that said Cushman then had no other property than said debt except \$300 worth of personal property, and that he was then a resident householder of the county; that Haynes, Spencer & Co. had immediate notice of the execution of such instrument, and before they had notice of these proceedings; that

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it yet owes said debt; that on said 15th day of December, 1882, said Bouslog held the acceptance of Cushman of date of December 13th, 1882, at ten days, for \$996.76, and that the same was a just and good-faith debt, and remains unpaid.

Upon these facts the court stated as the first conclusion of law, "that said assignment to said Charles C. Binkley by said Cushman is fraudulent and void as to said plaintiff."

It is to this conclusion of law that objection is made. It is not contended that any actual fraud was intended, but appellee insists that the transaction was a voluntary assignment by Cushman for the benefit of his creditors, and the statute in relation to voluntary assignments not having been complied with, the assignment is fraudulent and void. And appellants insist that the transaction was only a preference of some of Cushman's creditors to others, and that it is not controlled by the statute in relation to voluntary assignments.

The 2662d section, R. S. 1881, provides, "Any debtor or debtors in embarrassed or failing circumstances may make a general assignment of all of his or their property, in trust for the benefit of all his or their *bona fide* creditors; and all assignments hereafter made by such person or persons for such purpose, except as provided for in this act, shall be deemed fraudulent and void."

This statute only provides for a general assignment of all a debtor's property for the benefit of all his creditors. And when that is attempted, the statute must be complied with, or the assignment, without regard to actual fraud, will be held fraudulent and void, but an assignment by a debtor for the benefit of a part of his creditors, in order to be held void, must be actually fraudulent. This statute does not prevent good-faith preferences of one creditor over another. *Lord v. Fisher*, 19 Ind. 7; *Wilcoxon v. Annesley*, 23 Ind. 285.

In the former case it was said: "Naturally, a man has a right to make an honest disposition of his property; that is to say, he may use it to pay any honest debt. It may not be an honest disposition of property to sell it upon a new, and even

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adequate consideration, if the sale is to keep the property from creditors. It is an honest disposition of a man's property to use it in paying or securing an honest debt. It is a dishonest use of it to pretend to convey it to pay or secure a debt, when, in fact, it is conveyed to be held upon a secret trust for the benefit of the grantor. It is not, in the eyes of the law, necessarily a dishonest use of a man's property to convey all he has to pay or secure one debt while he leaves many others unpaid, or unsecured." *Chandler v. Caldwell*, 17 Ind. 256.

In the case at bar, there was an absolute disposition and appropriation of the account against Haynes, Spencer & Co. to Binkley for the use of Bouslog and Chamness, Cushman retaining no further interest in it, nor could he take any further control over it.

In the case of *Terry v. Deitz*, 49 Ind. 293, it was held that money deposited with the clerk for redemption could not be reached by proceedings supplementary to execution against the depositor, before his right to redeem had been determined.

In the case of *O'Brien v. Flanders*, 41 Ind. 486, it was held that a person can not be deprived of the benefit of collaterals or their proceeds, deposited to secure indebtedness to him, except upon a discharge of the indebtedness.

In the case under consideration, the account on Haynes, Spencer & Co., by Cushman, the execution defendant, had been assigned to and deposited with Binkley, unconditionally and in good faith, to be by him collected and paid over to Bouslog and Chamness, and the arrangement fully accepted and acquiesced in by all these parties, before the commencement of these proceedings supplementary to execution. Bouslog had a vested right in the account and could have maintained an action against Binkley for any wrongful appropriation of the proceeds. And we do not think that this transaction can be governed by the aforesaid statute in relation to voluntary assignments, nor that the assignment was fraudulent

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and void under the findings of the court. The court erred in said conclusion of law. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded with instructions to the court below to sustain the demurrer to the complaint and for further proceedings.

Filed April 23, 1884. Petition for a rehearing overruled Sept. 20, 1884.

No. 10,528.

LAWRENCE, ADMINISTRATOR, v. SAMPLE.

PROMISSORY NOTE.—*Joint Makers.*—*Personal Defence.*—*Judgment against One.*

—*Puis Darrein Continuance.*—Where one of two makers of a joint promissory note succeeds in a defence personal to himself, and not involving the merits of the action, against both of the makers, and upon appeal the judgment in his favor is reversed, he can not upon a new trial escape liability under a plea *puis darrein continuance*, alleging that a judgment has been taken, in such action, against his co-defendant, which still remains in force.

From the Benton Circuit Court.

W. D. Wallace and A. A. Rice, for appellant.

W. C. Wilson, J. H. Adams and J. R. Coffroth, for appellee.

BLACK, C.—Christiana Underwood, executrix of the will of John Underwood, her deceased husband, brought suit in the Tippecanoe Circuit Court against David McBride and the appellee, John G. Sample, upon a joint promissory note made by said defendants to said John Underwood.

McBride, upon whom there was due service of summons, was defaulted. Sample appeared and answered in two paragraphs: *First.* Payment by McBride. *Second.* That McBride executed the note as principal and Sample executed it as McBride's surety, which fact was well known to the payee and to the plaintiff; and that the plaintiff having such knowledge, she and McBride, without the knowledge or consent of Sam-

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ple, entered into a contract whereby for a valuable consideration stated, the time of payment of the note was extended for five years after its maturity.

The plaintiff replied to these answers by a general denial. There was a trial by jury, and a verdict was returned in favor of Sample. A motion for a new trial made by the plaintiff was overruled, and judgment in favor of Sample was rendered on the verdict on the 5th of November, 1875. After the rendition of this judgment, and on the same day, on motion of the plaintiff, judgment was rendered in favor of the plaintiff for the amount of the note against McBride, the default against whom had been entered on the 26th of June, 1875.

From the judgment in favor of Sample the plaintiff appealed, and this court, upon that appeal, reversed said judgment in favor of Sample, and remanded the cause for a new trial. See *Underwood v. Sample*, 70 Ind. 446.

After the return of the cause to the Tippecanoe Circuit Court, Sample filed his plea *puis darrein continuance*, alleging that the plaintiff ought not further to maintain her action for reasons set forth, being, in effect, that judgment had been rendered in favor of Sample as aforesaid, which had been reversed as above stated; that the plaintiff had taken judgment against McBride as aforesaid; and that the judgment against McBride remained in force.

The plaintiff's demurrer to this plea was overruled, and she replied by denial.

The death of the plaintiff having been suggested, the suit, upon the petition of the appellant, Levi L. Lawrence, administrator with the will annexed of said Christiana Underwood, deceased, was revived in his name, as successor in interest.

The venue was changed to the Benton Circuit Court, where, all the original answers having been withdrawn, the issue formed by the denial of the plea *puis darrein continuance* was tried by the court, the result being a finding and a judgment thereon in favor of the appellee.

It is a well known rule of the common law, not changed

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by the code, that a judgment against a joint debtor, obtained in an action on the joint contract against him alone, is a bar to a subsequent action on such contract against the other joint debtors. *Suydam v. Barber*, 18 N. Y. 468; *Peters v. Sanford*, 1 Den. 224; *Cox v. Maddux*, 72 Ind. 206; *Robinson v. Snyder*, 74 Ind. 110.

Provision is made by our code, sections 320, 321, R. S. 1881, that where the action is against two or more defendants jointly indebted on contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against those served, and if he recover judgment against them, he may afterwards proceed against those not summoned and who did not appear, as if they alone were liable, alleging the former proceeding in his complaint.

When all the joint debtors are sued and served with process, it is error to render judgment against some of the defendants and in favor of others, unless the latter establish some matter going to their personal discharge, and not to the merits of the action against all the defendants; for unless there be some such matter, the defendants are only jointly liable, if liable at all. *Mullendore v. Silvers*, 34 Ind. 98.

If the judgment for the appellee, which was reversed, was rendered upon the theory that he had established his personal defence of extension of time of payment, it would not be error to render the judgment which was rendered for the plaintiff against McBride.

Did the rendition of the judgment against McBride preclude any further proceeding on the part of the plaintiff against the appellee, upon the reversal of the judgment entered in his favor?

We do not find that this question has been directly decided by this court. Expressions in some opinions, not required by the facts of the cases, may seem to suggest an affirmative answer to this question. But upon careful consideration, after such examination of reported cases as we have been able to make, we have concluded that such an answer is not

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required by our authorities, and that such a doctrine would be inequitable.

It is contrary to the spirit of modern jurisprudence to permit technical rules of procedure to operate as mere traps for the unwary.

Here the plaintiff did not elect to pursue a single one of the joint debtors, but brought suit against all of them. A judgment was obtained by the plaintiff, which would have been against both of the defendants but for the erroneous verdict in favor of one upon a personal defence. The plaintiff, or her successor, is still pursuing the appellee in the action in which the judgment against McBride was entered.

Giving effect to the equitable spirit of the code, and following the analogy of said sections 320 and 321, we hold that the cause of action against the appellee is not merged in the judgment against McBride, and that the court erred, therefore, in overruling the demurrer to the plea *puis darrein continuance*.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellee, and the cause is remanded, with instruction to sustain the demurrer to the plea *puis darrein continuance*.

HAMMOND, J., took no part in the decision of this cause.

Filed May 16, 1884. Petition for a rehearing overruled Sept. 20, 1884.

 No. 10,857.

ROBINSON v. SNYDER ET AL.

JUDGMENT.—*Promissory Note.*—*Release of Surety.*—*Burden of Proof.*—Where two joint makers of a note are sued, and one claims to be released because a former judgment rendered upon such note is still subsisting against his co-maker, the burden is upon him.

SAME.—*Motion to Set Aside.*—*Justice of the Peace.*—*Partnership.*—Where a judgment by default before a justice of the peace is rendered upon a partnership note against both partners, and one of them within ten days

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thereafter pays the costs and moves to set aside the judgment, which is done, it must affirmatively appear that such judgment was only set aside as to the person asking it; otherwise it will be deemed set aside as to both defendants.

SAME.—*Entry of Judgment.—Presumption.*—The fact that the justice recites in his entry that such motion “is granted to him,” does not control the presumption that such judgment was set aside as to both defendants.

SAME.—*Transcript.*—Where the transcript of a judgment and the judgment itself conflict, the latter must control, as it is the primary and best evidence of itself.

SAME.—*Evidence.—Collateral Attack.*—Parol evidence is not admissible to contradict or impeach a judgment in a collateral proceeding.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not disturb the finding of the court upon a question of fact where the evidence is conflicting.

From the Whitley Circuit Court.

C. Clemans, for appellant.

T. R. Marshall and *W. F. McNaghy*, for appellees.

BEST, C.—The appellees brought this action before a justice of the peace against the appellant Seth F. Robinson, Elisha Hilliard and Ephraim Hilliard, partners doing business under the firm name of “Hilliard, Robinson & Hilliard,” upon a note executed by them in their firm name.

Judgment was rendered by the justice for the appellees, and the appellant alone appealed to the circuit court. The cause was there tried by the court, and judgment was rendered for the appellees. This judgment was reversed by this court, *Robinson v. Snyder*, 74 Ind. 110, and after the cause was remanded it was tried by the court, and, over a motion for a new trial, judgment was again rendered for the appellees.

The appellant appeals, and insists that the court erred in overruling his motion for a new trial. The only question embraced in the motion is whether the finding was not contrary to the evidence and to the law.

The appellees read in evidence the note and proved the value of the attorney fees. This made for them a *prima facie* case, and unless the appellant established an affirmative defence the finding was right.

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The appellant, as such defence, claims that the appellees, before the commencement of this suit, recovered a judgment upon this note before a justice of the peace against himself and Elisha Hilliard, one of the joint makers; that within ten days thereafter this judgment was set aside as to appellant, the cause thereafter dismissed as to him by the appellees, and that said judgment remains in full force as against said Hilliard, by reason whereof the appellant is released and discharged.

The appellees admit the rendition of said judgment, but deny that it was only set aside as to appellant; they claim it was set aside as to both defendants.

This judgment was rendered by default on the 27th day of April, 1878, and the appellant, in support of his claim, that it was only set aside as to him, read in evidence a transcript from the justice's docket, which contains this entry: "May 2d, 1878. Comes now one of the defendants in the above entitled cause, S. F. Robinson, and asks that a new trial be granted in the above entitled cause, and pays all costs that have accrued, and a new trial is hereby granted to him."

The appellees then produced the docket of the justice, and read therefrom this entry: "May 2d, 1878. Comes now one of the defendants in the above entitled cause, S. F. Robinson, and asks that a new trial be granted in the above entitled cause, and pays all costs that have accrued, and a new trial is hereby granted, and the above judgment is set aside."

Thereupon the appellant offered parol testimony to show that the entry, as shown by the transcript, was originally made by the justice, and that said justice, after ten days from the rendition of the judgment, changed said entry so as to make it read as it now appears upon the docket.

The appellee, in reply, offered some parol testimony to show that the transcript read in evidence by the appellant had been changed in such manner as to show that the judgment was only set aside as to the appellant.

The transcript and the docket both show that after the

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judgment was thus set aside, the plaintiffs dismissed the action, and the justice rendered judgment in favor of the defendants for costs.

This is the case made by the evidence, and it is manifest from its mere statement that we can not disturb the finding of the court upon this disputed question of fact. The long established rule of this court is not to disturb the finding where the evidence fairly tends to support it. The record produced in evidence in this case not only tended to support the finding, but, as we think, conclusively established the disputed question of fact.

The appellant, however, claims that the transcript shows that the judgment was not set aside as to Hilliard. Admit it for the sake of argument, and what have we? The transcript showing that the judgment was not set aside, and the record, itself, showing that it was set aside. Here is a direct conflict. Which must prevail, the record or that which purports to be a copy? The record, itself, is the primary, highest and best evidence, while the transcript, at most, is only secondary evidence. This has often been decided by our own and other courts. *Green v. City of Indianapolis*, 25 Ind. 490; *City of Logansport v. Crockett*, 64 Ind. 319; *Sawyer v. Garcelon*, 63 Maine, 25; *Gray v. Davis*, 27 Conn. 447.

The transcript and the record are both evidence, but where they conflict the original must prevail, as it bears upon its face indubitable and indisputable evidence of what it contains. The record was, therefore, abundantly sufficient to overcome the transcript, even if we assume that it shows that the judgment was not set aside as to Hilliard.

Did the transcript, however, show such fact? We doubt it. The entry it recites must be construed and read in the light of attending circumstances. This judgment was rendered against partners upon a partnership note. One of them within ten days thereafter pays the costs and asks, in the language of the entry, "that a new trial be granted in the above entitled cause," and the entry says "a new trial is hereby

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granted to him." He does not ask for a new trial for himself alone, nor intimate that such request is not made on behalf of himself and partner. Nothing was done by him that was not entirely consistent with the notion that he was acting for the firm and not for himself individually. Each partner is the agent of the others in relation to partnership business, and when any one of them does any act affecting such business, the presumption is that he is acting in behalf of the firm. The mere fact that the justice added the words "to him" to his entry does not control this presumption. The request was made by him and was granted to him, but it does not, therefore, follow, that the justice set aside the judgment to him alone. The entry does not necessarily indicate any such thing, and as this judgment was rendered against partners upon a partnership debt, we think the entry should affirmatively show that the judgment was only set aside as to one in order to control the presumption that it was set aside as to both.

If we are right in this view, then the appellant had no evidence whatever to support his defence, but if we are wrong the record itself controls and overcomes the evidence furnished by the transcript, so that in either view the finding was right.

The appellant, however, offered parol testimony to show that the justice changed the docket entry after the expiration of ten days from the rendition of the judgment, and insists the evidence furnished by the transcript, coupled with this testimony, controls the evidence furnished by the docket entry.

If we are right in the notion that the entry, as shown by the transcript, proves that the judgment was set aside as to both defendants, this testimony amounts to nothing; but if we are wrong in this construction, the result is the same, as this testimony was completely neutralized by the parol testimony of the appellees, tending to show that the transcript had been changed. The conflict thus created made a case peculiarly for the lower court, and its finding in such case will not be disturbed by this court.

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This much has been said upon the assumption that this testimony is to be considered. This testimony, however, can not be considered. Its purpose and its effect were to impeach the judgment of the justice collaterally. The appellant offered his record evidence to show that this note had been merged in a judgment taken against one of the joint makers. The appellees replied to this by reading a subsequent entry, showing that such judgment had been set aside. This entry was a judgment, and it can not be disputed or attacked in this collateral manner. *Hooker v. State*, 7 Blackf. 272; *Larr v. State*, 45 Ind. 364; *Pressler v. Turner*, 57 Ind. 56; *Friedline v. State*, 93 Ind. 366.

This judgment was conclusive evidence of the facts stated, and no evidence was admissible to contradict or impeach it. This testimony should, therefore, have been excluded below, and must be disregarded here.

This testimony being inadmissible, the only legitimate evidence of the existence of the judgment was the record or its copy, and as the record was produced and proved itself, it necessarily follows that the disputed question of fact was conclusively established.

The appellant also claims that these questions were decided with him upon the other appeal. In this he is mistaken. These questions were not presented nor considered. When the case was here before there was a special finding, with conclusions of law, to which appellant excepted, with a view of presenting the real question in the case. The court below, however, did not find whether or not the judgment was set aside as to Hilliard, and this court declined to infer such fact from the evidence embraced in the finding. Because of this defect the new trial was evidently granted. It is true that the court remarked that the finding was contrary to some uncontradicted evidence, but this remark can not be deemed a decision of these questions, and as they were not decided the appellees are not concluded.

This disposes of all the positions taken to assail the find-

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ing, and as we think it was right the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at appellant's costs.

Filed May 17, 1884. Petition for a rehearing overruled Sept. 26, 1884.

No. 11,714.

McCURDY v. LOVE, EXECUTRIX.

DECEDENTS' ESTATES.—*Judgment.—Complaint for Review.—Statute Construed.*

—A complaint for the review of any judgment or decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, is not authorized by the statute regulating the settlement of such estates; and, in such cases, the provisions of the civil code, for the review of judgments in civil actions, are not applicable.

From the Marion Circuit Court.

J. B. Julian and *J. F. Julian*, for appellant.

T. L. Sullivan, *A. Q. Jones*, *F. Rand* and *J. M. Winters*, for appellee.

Howk, J.—On the 10th day of December, 1881, the appellant, McCurdy, filed a claim in the court below against the estate of John Love, deceased, of which estate the appellee Mary F. Love was and is the executrix. Such proceedings were afterwards had on the appellant's claim, as that on the 21st day of May, 1883, it was adjudged by the court that he take nothing by his suit thereon, and that the appellee recover of him her costs therein expended.

Nearly one year after the rendition of such judgment, to wit, on the 1st day of May, 1884, the appellant filed his complaint in the case in hand to obtain a review of the judgment and proceedings, for an alleged error of law appearing therein. The appellee's demurrer to the complaint for review, for the alleged insufficiency of the facts therein to constitute a cause

97	68
120	240
97	68
125	220

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of action, was sustained by the court, and to this ruling the appellant excepted. He declined to amend or plead further, and the court rendered judgment against him for the appellee's costs.

The only error assigned here by the appellant is the decision of the court in sustaining the demurrer to his complaint for review.

The point is made by appellee's counsel, and pressed with much earnestness, that a complaint to review the proceedings and judgment, upon a claim against a decedent's estate, is not authorized by the statute regulating the settlement of such estates; and that the provisions of the civil code (section 615, R. S. 1881), in relation to the review of judgments in civil actions, are not applicable to judgments rendered upon claims against a decedent's estate. If this point is well taken, it is clear from our statement of the case in hand, that no available error was committed by the court in sustaining appellee's demurrer to the appellant's complaint for review. This is so, even if it be conceded that there are manifest errors of law in the proceedings and judgment sought to be reviewed. In section 2454, R. S. 1881, it is provided that "Any person considering himself aggrieved by any decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, may prosecute an appeal to the Supreme Court," etc. The statute regulating the settlement of decedents' estates contains no provision authorizing the filing of a complaint for the review of any decision growing out of any matter connected with such an estate in the court where such decision was made or rendered; but the only statutory remedy of the party aggrieved by any decision, in such a cause or matter, is the one provided in section 2454, *supra*, "an appeal to the Supreme Court."

It is settled by the decisions of this court, that the provisions of the civil code, in relation to appeals to the Supreme Court from judgments in civil actions, are not applicable to and do not govern appeals from "any decision of the circuit

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court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate;" but that these latter appeals are governed and controlled by the provisions of the statute, regulating the settlement of decedents' estates. Sections 2454 to 2457, R. S. 1881; *Seward v. Clark*, 67 Ind. 289; *Bell v. Mousset*, 71 Ind. 347; *Bake v. Smiley*, 84 Ind. 212; *Taylor v. Burk*, 91 Ind. 252; *Yearley v. Sharp*, 96 Ind. 469. In the case last cited it was held that where the appeal is taken under the statute providing for the settlement of decedents' estates, the transcript must be filed in this court, at the latest, within twenty days after the decision complained of is made, unless, "for good cause shown," this court should direct such appeal to be granted at any time within one year after such decision. Manifestly, therefore, at the time the appellant filed his complaint for review in the case at bar, he could not have prosecuted an appeal to this court from the judgment sought to be reviewed, for the reason that at that time nearly one full year had elapsed after the rendition of such judgment.

Where a party aggrieved by a judgment of the circuit court, in a civil action, has a clear right of appeal to this court, he may either prosecute such an appeal, or he may file his complaint for a review of the judgment in the court where it was rendered; but he can not pursue both remedies, for the rule is settled in this court that by his pursuit of one, he waives his right to the other remedy. *Indiana, etc., Co. v. Routledge*, 7 Ind. 25; *Davis v. Binford*, 70 Ind. 44; *Dunkle v. Elston*, 71 Ind. 585; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350.

Where, from lapse of time or other cause, a party aggrieved by a judgment of the circuit court can not prosecute an appeal therefrom to this court, can he maintain an action for the review of such judgment for alleged errors of law appearing therein in the court where the same was rendered? This question was answered by this court in the negative, and,

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we think, correctly so, in *Klebar v. Town of Corydon*, 80 Ind. 95. It was there held substantially, that where, by the plain terms of the statute, an appeal can not be taken from the judgment of a circuit court to this court, and where a review of such judgment, for alleged errors of law appearing therein, has been denied by the judgment of such circuit court, an appeal will not lie to this court from the latter judgment.

We conclude, therefore, that a complaint for the review of any judgment or decision of a circuit court, growing out of any matter connected with a decedent's estate, is not authorized by the statute regulating the settlement of such estates, and that the provisions of the civil code, for the review of judgments in civil actions, can not be held applicable to such cases as the one now before us. Any other conclusion than this, upon the point under consideration, would render nugatory and practically annul the limitations and restrictions imposed by the statute upon appeals to this court from the judgment or decision of a circuit court, or judge thereof in vacation, "growing out of any matter connected with a decedent's estate." For, while such appeals must be perfected at the latest, under the statute, within twenty days after the decision complained of is made, a complaint for the review of a judgment in a civil action, for error of law appearing therein, may be filed under the civil code at any time within one year after the rendition of the judgment.

For the reasons given, we are of opinion that the court, in sustaining the demurrer to the appellant's complaint for review, committed no error which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Sept. 16, 1884.

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No. 11,214.

WILEY v. BAUMGARDNER ET AL.

CONTRACT.—*Restraint of Trade.—Public Policy.*—A contract in restraint of trade is void, if the restraint be unreasonable, and this question is one of law for the court to determine, and the contract will be supported or avoided on grounds of public policy.

SAME.—*Protection of Party.*—All restraint of trade beyond that necessary to protect the party contracting therefor is void as injurious to the public.

SAME.—*Limitation of Time.—Territory.—Trade Secret.*—Where one engaged in business sells his stock or his business and good-will with a limitation upon the restraint as to time, but none as to territory, the restriction is void, and a contract preventing one from carrying on his calling anywhere is unreasonable. Where the subject-matter of contract is a trade secret, this rule has been held not to apply.

SAME.—*Divisible Contract.*—Where the contract is for a reasonable and limited space, and is also extended to an unlimited or an unreasonable space, it is divisible, and the limited restriction may be enforced.

SAME.—*Good-Will.*—W., being engaged in business, sold to B. his stock of dry goods and assigned the insurance thereon, and transferred his lease of the premises occupied, and contracted not to engage in the dry goods business for a term of five years from date of contract. B. purchased additional stock and continued the business on the same premises. W., within the time limited, resumed business in the same town. In a suit by B. for damages,

Held, that the contract in restraint of trade was against public policy and void.

Held, also, that it was immaterial whether the contract expressed in terms a sale of the good-will of the business, or of the business itself.

From the Wells Circuit Court.

J. S. Dailey and L. Mock, for appellant.

J. Morris and T. W. Wilson, for appellees.

BLACK, C.—The complaint, in an action brought by the appellees against the appellant, consisted of a number of paragraphs, to all of which except the third demurrers were sustained. A demurrer to the third paragraph for want of sufficient facts was overruled. This ruling alone is assigned as error.

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The action was upon a contract in writing, by which the appellant sold to the appellees the former's entire stock of dry goods, boots and shoes, merchandise and fixtures in his store in Bluffton, at cost, less a certain per cent., and agreed to transfer to them his lease on the building occupied by him for his store-room, and his unexpired insurance on said stock, and agreed "not to engage in the dry goods business for a term of five years from" the date of the agreement, being the 29th of December, 1881, the appellees agreeing on their part, by way of payment, to transfer to the appellant a certain farm, which was to represent the sum of \$6,000, to execute to him their promissory note for \$1,000, and for the balance to execute their promissory notes, secured by mortgage on certain lands of one of the appellees. And it was agreed by all the parties that "for the faithful performance of the above contract, we hereby bind ourselves to each other in the sum of \$1,000, liquidated damages."

It was alleged that the appellees intending to engage in the dry goods business in said town, the contract was entered into by them and the appellant for such purpose; that immediately after the purchase the appellees engaged in said business in said town, and that they were still continuing the same. The breach alleged was that in September, 1882, the appellant purchased a large stock of dry goods, of the value of \$10,000, and with them opened a dry goods store in said town, within a few doors of the place of business of the appellees, and engaged in the dry goods business in said town, and still continued the same; that during the time he had been thus engaged in business, he had sold a large amount of dry goods in said town, the amount of \$10,000, thereby taking away from the appellees said trade, to their damage \$1,500, for which they demanded judgment.

The only question to be decided is whether the agreement in restraint of trade was valid.

A contract in restraint of trade is void, if the restraint be

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unreasonable, and the question as to the reasonableness of the restriction is one of law, to be determined by the court; and the contract is supported or avoided on grounds of public policy. "Whatever restraint is larger than the necessary protection of the party with whom the contract is made, is unreasonable and void, as being injurious to the interests of the public, on the ground of public policy." *Mallan v. May*, 11 M. & W. 653, quoting from *Horner v. Graves*, 7 Bing. 735. See, also, *Beard v. Dennis*, 6 Ind. 200; *Harrison v. Lockhart*, 25 Ind. 112; Whart. Cont., section 433, and authorities there cited.

In the contract now before us, the transaction was not expressed as a sale of the good-will of the business, or as a sale of the business. But it would have made no difference if there had been an express sale of the good-will. Where a person carrying on any business sells his stock in trade, or his business and his good-will, and in the transaction agrees not to carry on the same business, with a limitation upon the restraint as to time but none as to space, the agreement as to such restraint is wholly void.

This must be so if the test be that the contract is to be supported or avoided on the ground of public policy. If it be prejudicial to the public interest for a citizen to be debarred from pursuing anywhere the calling in which he has acquired skill or proficiency, or to encourage the establishment of monopolies by preventing competition, it must be so for definite as well as for indefinite periods of time. A contract that would put it in the power of one party to prevent the other from carrying on his calling anywhere whatever is unreasonable.

PARKE, B., in *Ward v. Byrne*, 5 M. & W. 548, said: "When a general restriction, limited only as to *time*, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of

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a total restriction on trade, limited only as to time." All the judges concurred.

Whittaker v. Howe, 3 Beav. 383, it is said by Mr. Benjamin (Benj. Sales, section 525), "has been practically overruled in the later cases;" and *Rousillon v. Rousillon*, L. R., 14 Ch. D. 351, is distinguished in Wharton on Contracts, section 430, *et seq.*, and notes, as involving a question of breach of trust.

A restraint unlimited as to space has been held not unreasonable where the subject-matter of the contract was a trade secret. *Leather Cloth Co. v. Lorisont*, L. R., 9 Eq. Cas. 345.

Where the restraint is applied in the contract to a limited and reasonable space, and also extended to an unlimited or unreasonable space, the contract may be held to be divisible, and the restriction as to the reasonable limits expressed may be enforced; as a covenant not to enter into the manufacture of matches in St. Louis or any other place for five years was held valid as to St. Louis. *Peltz v. Eichele*, 62 Mo. 171. See, also, *Mallan v. May*, *supra*; *Nicholls v. Stretton*, 10 Q. B. 346.

The restraint in the case at bar can not be enforced. The question whether the sum in which the contract purported to bind the parties for faithful performance should be regarded as liquidated damages or as a penalty, is not before us and is immaterial.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellees, with instruction to sustain the demurrer to the third paragraph of the complaint.

Filed May 8, 1884. Petition for rehearing overruled Sept. 25, 1884.

Scheffermeyer v. Schaper, Guardian.

No. 10,725.

SCHEFFERMEYER v. SCHAPER, GUARDIAN.

SHERIFF'S SALE.—*Agreement.—Fraudulent Representations.—Right to Redeem.*

—*Sale without Appraisement.—Complaint.*—A. owned a certain lot upon which was a mortgage debt due B. The lot was sold under an execution for another debt and purchased by B., who represented to A., who was a foreigner and uninformed on the subject, that the lot was not subject to redemption unless the mortgage debt was also paid, but promised to hold the same in trust until the rents and profits paid the judgment and ten per cent. interest, and also the mortgage debt. These representations are alleged to have been false and fraudulent. Repairs being required on the premises, B. was let into partial possession and made repairs, which, by agreement, were to be included in the debt. Subsequently the lot was sold under the mortgage without relief from valuation or appraisement laws, although the mortgage did not authorize this, and the property was purchased by B., who had been let into full possession and who now claims to hold an absolute title to the property, although the time for redemption has not yet expired. It is alleged that the rents and profits since the property has been in possession of B. have more than paid both debts, interest and repairs. A. offered to pay any balance due on an account being taken, and demands judgment for any excess of payment and possession of the property.

Held, that the paragraph of the complaint alleging these facts contains a good cause of action.

SAME.—*Statute of Frauds.—Redemption.—Agreement to Hold in Trust.*—Where a purchaser at sheriff's sale induces the owner of real estate not to redeem by a promise to hold the property until repaid out of the rents and profits, and then to return the property, the promise is not void under the statute of frauds.

SAME.—*Appraisement.—Sale without Relief from Valuation and Appraisement Laws.*—Where there is no waiver of valuation and appraisement laws, a judicial sale without regard to appraisement is, at least, voidable.

From the Kosciusko Circuit Court.

J. S. Frazer and W. D. Frazer, for appellant.

W. Olds, W. F. McNagny and H. S. Biggs, for appellee.

BICKNELL, C. C.—This suit was commenced against Charles Schaper, who afterwards became insane, and the appellee, his guardian, took his place as defendant.

The question presented is, was the amended second paragraph of the complaint sufficient?

97	70
135	243
97	70
138	81
97	70
153	419

Scheffermeyer v. Schaper, Guardian.

Its averments were, substantially, that the plaintiff, in May, 1866, owned a lot worth \$9,000, which he and his wife had mortgaged to said Charles Schaper for \$2,034, payable in March, 1867; that said lot, under an execution issued on a judgment against the plaintiff, was bought in by said Charles Schaper for \$960; that plaintiff, being a German, and imperfectly acquainted with the language and laws of this State, had great confidence in said Schaper, who had artfully pretended to be his friend, and who was wealthy and intelligent, and understood that land sold on execution could be redeemed within a year by payment of the purchase-money and ten per cent. interest, and was also aware of the plaintiff's ignorance; that in July, 1867, said Charles Schaper fraudulently and falsely represented to the plaintiff that he could not redeem the land from said execution sale without also paying said mortgage debt, he then well knowing that plaintiff was not able to do both, and that plaintiff was relying on his friendship and knowledge, and he then intending by said false representation to deceive the plaintiff and to induce him not to redeem from said sale; that before the expiration of the year for redemption said Charles Schaper pretended and stated to the plaintiff that he did not wish to become the absolute owner of said lot, and he offered to take the sheriff's deed and hold it until the rents and profits thereof should equal the amount of his bid and ten per cent. per annum thereon, and said mortgage debt, and that he would then convey said lot to the plaintiff; that the plaintiff accepted this offer, and, relying on said agreement, did not redeem the land nor take counsel as to his rights as he would have done if no such agreement had been made; that afterwards said parties agreed that plaintiff should make repairs upon the premises, and in consideration thereof should receive the rents and profits and retain possession of part of said premises until the spring of 1868; that in February, 1868, said Schaper foreclosed his said mortgage for \$2,274.30, and obtained a decree for the sale of said lot, not waiving valuation and appraisement laws, and stated to

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the plaintiff that if the lot should be sold and he, said Schaper, should buy it, notwithstanding such sale, whenever the rents and profits of said premises, received by said Schaper, should be sufficient to satisfy said decree, and said bid at the execution sale and ten per cent. thereon, then he would reconvey said lot to the plaintiff in accordance with his original agreement; that, relying on said agreements, the plaintiff neither redeemed the lot from the execution sale nor paid the mortgage debt, but about April 1st, 1868, delivered to said Schaper the possession of said premises; that said Schaper afterwards had the lot sold under his said decree, and bought it at the sale for \$2,361.62, and took the sheriff's certificate of such purchase, but has not yet taken a deed, and that he now claims a title in fee simple by virtue of said last mentioned sale; that said Schaper, for the purpose of defrauding the plaintiff and putting him off his guard, made said representations, promises and agreements, knowing them to be false, and not intending to perform them; that said sale under said foreclosure is void because it was without appraisement; that under said first agreement said Schaper took possession of part of said premises in July, 1867, and has ever since received the rents and profits of that part, and since April 1st, 1868, has had the possession and the rents and profits of all the premises, of the annual value each year of \$600, enough to have long ago satisfied said first bid and said mortgage debt, and ten per cent. per annum interest thereon, and all costs, taxes and assessments, and all repairs and improvements; that the plaintiff, in 1873, demanded an account from said Schaper which he refused, and still refuses, and now claims that the said lot and all said rents and profits belong to him absolutely; that if anything is due said Schaper by reason of the premises, the plaintiff is ready and hereby offers to pay the same when ascertained, as the court shall direct, and he prays that an account be taken of said rents and profits, taxes and assessments, repairs and improvements, and that if anything remains due the plaintiff he may

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have judgment therefor, and for the possession of said real estate and all other proper relief.

We think this complaint contains a good cause of action; it avers that Schaper induced the plaintiff not to redeem the lot by promising that he would take the sheriff's deed and hold it until repaid out of the rents and profits, and that he has been repaid out of the rents and profits. Such an agreement will not be void under the statute of frauds. *Butt v. Butt*, 91 Ind. 305; *Rector v. Shirk*, 92 Ind. 31. And as to the sale under the mortgage, the sheriff had no authority to sell without appraisement. Such a sale is, at least, voidable. *Fletcher v. Holmes*, 25 Ind. 458; *Evans v. Ashby*, 22 Ind. 15; *Doe v. Craft*, 2 Ind. 359; *Tyler v. Wilkerson*, 27 Ind. 450; *Stotsenburg v. Same*, 75 Ind. 538; *Jones v. Kokomo Building Ass'n*, 77 Ind. 340; *Weaver v. Guyer*, 59 Ind. 195; *Cox v. Bird*, 88 Ind. 142. We need not determine what would be the effect of false representations of mere matters of law unconnected with the other matters averred in the complaint. See *Peter v. Wright*, 6 Ind. 183.

The court erred in sustaining the demurrer to the amended complaint.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded with instructions to overrule the demurrer to the amended second paragraph of the complaint.

Filed May 8, 1884. Petition for a rehearing overruled Oct. 9, 1884.

 No. 11,082.

BELCK v. BELCK.

97	73
170	568

CONTINUANCE.—*Absence of Attorney.*—*Discretion of Court.*—An application for a continuance on account of the absence of an attorney is addressed to the sound discretion of the court, and unless it appears that injustice has been done, the ruling will not be disturbed.

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SAME.—Attorney and Client.—In such case, where the party has other attorneys, and it does not appear that he has not had time to inform them of his case, the same will not be postponed.

SLANDER.—Statute of Limitations.—Instructions.—Commencement of Action.—An instruction, in an action of slander, informing the jury that the cause is not barred if the actionable language was spoken within two years before the complaint is filed, is not erroneous, when the writ was issued on the same day that the complaint was filed, as the action has then commenced.

SAME.—Instruction.—Malice.—If, in such case, no excuse was shown, or if the language was spoken with malice in fact, an instruction to find for the plaintiff, if the language is found to have been spoken as alleged, was correct.

SAME.—Presumption.—Where the language spoken is actionable *per se*, and no legal excuse or justification is shown, the law presumes malice.

SAME.—Measure of Damages.—An instruction to the jury, in such a case, that there is no legal rule governing the assessment of damages, is strictly correct, as these must be determined by them, in the exercise of a wise discretion, under all the circumstances of the case as disclosed by the evidence.

SAME.—Evidence.—A general direction to assess such damages as the jury think right, without any direction as to the rules of law by which they are to be governed, can not be approved, but where the evidence is not in the record and it may have shown a wanton and malicious injury, the jury were not limited in their assessment unless it indicated corruption or partiality, and, as this is not claimed, such instruction will not authorize the reversal of the judgment.

PRACTICE.—Where the evidence is not in the record, an instruction will not be deemed erroneous if proper under any supposable state of facts.

From the Marion Circuit Court.

W. D. Bynum, A. T. Beck and W. F. A. Bernhamer, for appellant.

R. N. Lamb and S. M. Shepard, for appellee.

BEST, C.—The appellee sued the appellant for slander in charging her with being a whore.

The complaint contains a half-dozen different set of words, each making the above charge, one-half in the second and the other half in the third person.

An answer in denial and that the cause of action was barred was filed; a reply, trial, verdict, and judgment for \$1,000. A

Belck v. Belck.

motion for a new trial was overruled, and this ruling is assigned as error.

The first point relied upon for a reversal is that the court erred in refusing to continue the cause for three days because of the absence of one of the appellant's attorneys. The affidavit in support of this motion stated that one William D. Bynum, the appellant's attorney, and the only one with whom he consulted or who was cognizant of the facts constituting his defence, was then in Galveston, Texas, as a representative of the Grand Jurisdiction of Indiana of the "Knights of Honor," at the session of the Supreme Lodge of that order, or on his return therefrom, and that he would and could be ready to try the cause at the expiration of such time; that he had a good defence to said action, etc.

These applications are addressed to the sound discretion of the court, and unless it appears that injustice has been done the ruling will not be disturbed. *Whitehall v. Lane*, 61 Ind. 93.

This does not appear. The appellant had two other attorneys, and it was his duty to put them in possession of the facts constituting his defence. These they could readily understand, as the only defence pleaded was a denial that the words were spoken within two years before the commencement of the suit. But little time was necessary to render them conversant with such defence, and, for aught that appears, abundant time had already elapsed since he knew that one of his attorneys would be away when the cause would be reached for trial, to enable him to consult with and fully inform his other attorneys as to the facts constituting his defence. If so he was required to be ready, and was not entitled to a postponement until the return of the absent attorney. There was no error in this ruling.

The next point urged is that the court erred in charging the jury, that if the plaintiff proved by a fair preponderance of the evidence that the defendant used of and concerning the

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plaintiff some set of words, or the substance of them, as alleged in the complaint, within the last two years before filing the complaint, they should find for the plaintiff.

This instruction is assailed upon two grounds. The first is that the filing of the complaint is not the commencement of the action, and, therefore, this instruction was erroneous. This is true. The action is not commenced, as a general rule, until the writ is issued, and as a cause of action which accrued within two years before the complaint was filed may be barred before the suit is commenced, the instruction, in view of the fact that the statute of limitations was pleaded, was not strictly correct, but as the writ in this case was issued upon the same day that the complaint was filed, the instruction was correct as applied to this case. The suit having been commenced on the same day the complaint was filed, the cause of action was not barred if the language was spoken within two years before the complaint was filed, and hence the instruction was not erroneous in this respect.

The next objection urged to this instruction is, that it directs the jury to find for the plaintiff, as appellant contends, without proof of malice. In other words, that the court assumed, if the words were spoken, that they were maliciously spoken. This was not erroneous. The law imputes the malice where the language is actionable *per se*, and no legal excuse or justification is shown. Townshend on Slander, section 87; 3 Sutherland Dam. 650, and authorities cited.

The evidence is not in the record, and in such case an instruction will not be regarded erroneous if proper under any supposable state of facts. *Boyd v. Wade*, 58 Ind. 138; *Davidson v. Nicholson*, 59 Ind. 411.

If, then, no excuse was shown, or if the charges were made with malice, in fact, as the language itself implies, the instruction was right, as upon proof of speaking of the words the plaintiff was entitled to recover. This was all the plaintiff was required to prove, and upon such proof, in the absence of an excuse, she was entitled to recover, though there

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was no express malice. This instruction was not, therefore, erroneous.

The appellant also insists that the court erred in instructing the jury as follows: "There is no legal rule governing the amount of damages in cases of this character, but the question of damages is addressed to the sound judgment and discretion of the jury, taking into consideration all the evidence in the case and the circumstances under which they were spoken, and under this rule assess such damages as you think just and right under the circumstances."

The appellant insists that the instruction is erroneous in two respects, first, in saying to the jury that "There is no legal rule governing the amount of damages in cases of this character," and second, in saying to them, "Assess such damages as you think just and right under the circumstances."

The statement that there is no legal rule governing the amount of damages in cases of this character is strictly correct. The amount is to be determined by the jury, in the exercise of a wise discretion, under all the circumstances of the case as disclosed by the evidence. There are general rules applicable to the circumstances of each particular case, under and in pursuance of which the damages should be assessed, but no rule governing the amount. If the charge is uttered without malice in fact, the injured party is entitled to compensation, and if with malice in fact, then exemplary damages may be added. The amount, however, is not governed by any rule of law, but the jury, in the exercise of a wise discretion, must determine the amount of the compensation or of exemplary damages, as the case may be, under all the circumstances of the case. 3 Sutherland Dam. 643.

The general direction to assess such damages as the jury "think just and right under the circumstances," without any direction as to the rules of law that control, can not be approved, as it would seem to allow them to assess damages without any restraint or limitation, but according to their own arbitrary discretion. This the law does not authorize.

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Townshend Slander, section 289; *True v. Plumly*, 36 Maine, 466; *Rose v. Story*, 1 Pa. St. 190.

The fact, however, that this general direction as given can not be approved, does not necessarily compel the reversal of the judgment. The evidence, as before stated, is not in the record, and in such case a wrong instruction will not authorize the reversal of the judgment unless the instruction is erroneous under any supposable state of facts. This has been held to be the rule under the present statute. *Drinkout v. Eagle Machine Works*, 90 Ind. 423. This rule being applicable, we can not say that the direction was erroneous under any supposable state of facts. The evidence may have established a case of wanton injury, inflicted under such circumstances as not only to warrant substantial compensatory damages, but to justify exemplary damages, and, if so, the jury, in the exercise of a sound discretion, were authorized to assess the damages at such sum as they thought just and right under the circumstances. In such supposed case of wanton and malicious injury, there is no limit to the assessment in the sound discretion of the jury other than the inhibition that the amount of the assessment must not indicate that it was the result of passion, prejudice or corruption. This is not claimed, and as the assessment is such as the jury were authorized to make in the case supposed, it does not appear that the general direction was not a proper direction under the circumstances. For these reasons we think this charge will not warrant a reversal of the judgment.

This disposes of all the questions raised, and as there is no error in the record, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellant's costs.

Filed April 23, 1884. Petition for a rehearing overruled Sept. 25, 1884.

 Ross *et al.* v. Davis *et al.*

No. 11,091.

ROSS ET AL. v. DAVIS ET AL.

97	79
145	141
145	574

SUPREME COURT.—*Motion.—Assignment of Error.—Bill of Exceptions.*—Unless the grounds of the motion mentioned in a specification under an assignment of errors appear in the bill of exceptions, no question can be made in the Supreme Court upon the ruling on the motion.

97	79
149	457

97	79
157	327

DRAINAGE.—*Highway.—Utility.—Expense.*—Although proceedings for the construction of a drain under secs. 4273, *et seq.*, R. S. 1881, can be commenced only by an owner of land which will be benefited, this will not render the work one of private benefit only, because the granting of the petition must rest upon the ascertainment of the fact, that by the drain the public health will be improved, or one or more highways of the county or streets of a town or city will be benefited, or that the work is of public utility, and provision is also made that when the drain is completed it shall be maintained at the public expense.

97	79
158	278

97	79
164	435

SAME.—*Public Use.—Equality of Benefits.*—It is not necessary in order to constitute a public use, that the whole community or any large portion thereof should participate in the use, or that all should be equally benefited.

SAME.—*Constitutional Power.—Payment of Costs and Damages.—Compensation for Property.*—It is within the constitutional power of the Legislature to provide for the payment of the costs of the construction of the drain and for the damages resulting, by means of the assessment of benefits accruing to the owners, and compensation for property appropriated may be made in such benefits, or out of money realized by assessment of benefits resulting to the owners.

SAME.—*Costs.—Damages.—Expenses.—Benefits.*—Under the statute, the costs, damages and expenses of the drainage must be less than the benefits to the owners of lands likely to be injured.

SAME.—*Assessment.—Commissioners.—Contest.*—The assessment made by the commissioners may be contested.

SAME.—*Taking of Property.—Payment of Damages.—Constitutional Law.*—*Query*, whether the statute contemplates the payment of damages before the taking of property, or whether the taking of property under the statute is a taking by the State within the constitutional provision that "No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

SAME.—*Title of Act.—Drainage Commissioners.*—The title, "An act concerning drainage," properly embraces legislation authorizing a board of drainage commissioners.

SAME.—*Assignment of Errors.*—That the report of the drainage commissioners is not according to law is not a sufficient assignment of error.

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SAME.—Trial by Jury.—Constitutional Provision.—The statutory provision, that questions of fact shall be tried by the court, does not conflict with the constitutional requirement, that “In all civil cases, the right of trial by jury shall remain inviolate.”

From the Harrison Circuit Court.

B. P. Douglass, S. M. Stockslager and W. C. Green, for appellants.

W. N. Tracewell and R. J. Tracewell, for appellees.

BLACK, C.—On the 1st of November, 1881, the appellees filed their petition for the construction of a ditch, pursuant to the act of April 8th, 1881, Acts 1881, p. 397; R. S. 1881, section 4273, *et seq.* At the next term of the court the appellant Ross appeared and moved to dismiss the petition. The motion was overruled. The petitioners having made proof by affidavit that notice of the intention to present the petition had been posted, as provided by the statute, the court heard the matter and referred it to the commissioners of drainage, who, at the next term, made their report, favorable to the construction of the ditch. The appellant Ross moved to set aside the submission of the matter to the commissioners. The motion was overruled. Thereupon said Ross filed his remonstrance. The court sustained the remonstrance as to the second and eighth statutory causes of remonstrance stated therein, and ordered that the commissioners correct and amend their report as to the description of the commencement and route of the proposed ditch, and that they review the matter and make a new report upon the question as to whether the work decided upon was or was not sufficient to properly drain the lands to be affected. At the same term the commissioners filed their amended report.

At the next term Arthur J. Cunningham and Charles Eberinz, the appellants other than said Ross, filed their joint remonstrance. The appellant Ross also filed his remonstrance to the amended report.

The appellants jointly, and the appellant Ross separately, moved that a jury be called to try the questions of fact raised

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by the remonstrances. The motions were overruled, and the court tried the cause and found for the petitioners, that the material allegations of the petition were true, and found against the remonstrants on all the grounds assigned by them, except as to the fourth statutory cause of remonstrance as assigned by the appellant Cunningham, as to which cause the court found in his favor, that the assessment of benefits ought to be modified and equalized so as to show that his lands would not be benefited, and that the assessment against his lands should be taken off and the amount thereof should be placed on the lands of other persons named, as described in the petition, a certain portion on the lands of one person and the remainder on the lands of another. And the court found that the ditch would be of public utility, and that it would be practicable to accomplish the proposed drainage mentioned in the report of the commissioners at an expense less than the aggregate benefits to the lands which it would drain, and that the ditch set out and described in the amended report of the commissioners, describing it, ought to be established, and that the assessments made by the commissioners, except as so modified by the court, ought to be approved, setting out the same as so modified.

The appellants jointly moved for a *venire de novo*, and this motion having been overruled, the appellants jointly, and the appellant Ross separately, made motions for a new trial, which were overruled.

The court thereupon made its order establishing the ditch, describing it as in the amended report and in the finding, modifying the assessment of benefits as in the finding indicated, and approving and confirming the assessments as thus modified. And the court directed one of the commissioners named to construct the ditch in accordance with the provisions of said statute.

The appellants jointly have assigned as errors:

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"1. That the court below did not have jurisdiction of the subject of the action.

"2. That the petition does not state facts sufficient to constitute a cause of action.

"3. That the petition does not state facts sufficient to entitle the appellees to any relief.

"4. That the petition is not according to law.

"5. That the original report of the commissioners of drainage is not according to law.

"6. That the amended report of the commissioners of drainage is not according to law.

"7. That the court below erred in overruling the motion for a *venire de novo*.

"8. That the court below erred in overruling the motion for a new trial."

The appellant Ross has made a separate assignment, containing the same specifications as those contained in the joint assignment, numbered somewhat differently, and two additional specifications numbered 4 and 5, as follows:

"4. That the court below erred in overruling said appellant's motion to dismiss the petition.

"5. That the court below erred in overruling said appellant's motion to set aside the submission of this matter to the commissioners of drainage."

These additional specifications in the separate assignment of the appellant Ross may be disposed of by saying that the grounds of the motions mentioned in them are not shown by bill of exceptions, and that, therefore, no question is before us concerning the rulings upon those motions. The other specifications in the separate assignment of the appellant Ross need no discussion apart from the corresponding specifications in the joint assignment.

The only question argued under the first four of these specifications is that of the constitutionality of the statute under which the proceeding was had; and without any inquiry as

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to the sufficiency of the specifications, we will examine briefly the objections made under them.

It is insisted that the provisions for the construction of drains made in the statute are intended for private benefit only. Although the proceedings for the construction of a drain under the statute, such as the appellees instituted, can be commenced only by an owner or owners of lands which will be benefited by drainage, yet this objection of the appellants is sufficiently answered by referring to the provision of the statute, that the petition of such owner or owners shall state that in the opinion of the petitioner or petitioners the public health will be improved, or one or more public highways of the county or streets of a town or city will be benefited by the proposed drainage, or the proposed work will be of public utility; and the requirement that the commissioners of drainage shall consider whether, when accomplished, the drainage will improve the public health or benefit any public highway in the county, or street of a town or city, or be of public utility; and the provision that any owner of lands affected may remonstrate on the ground that the proposed work will neither improve the public health, nor benefit any public highway of the county, nor be of public utility, and that if the finding of the court be in support of the remonstrance, on this cause of remonstrance, the proceedings shall be dismissed at the costs of the petitioner; also, the provision for the keeping of such drains, after their construction, in proper repair and free from obstructions, by the public, through the township trustee, at public expense. *Ingerman v. Noblesville Tp.*, 90 Ind. 393.

It is not necessary, in order that the use may be regarded as public, that the whole community or any large portion of it may participate in it. If the drain be of public benefit, the fact that some individuals may be specially benefited above others affected by it will not deprive it of its public character.

But it is contended that the statute provides for the taking

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of private property, not by the State, without just compensation first assessed and tendered.

We have no doubt that it is within the power of the Legislature to make provision for the construction of such drains, so that the costs, damages and expenses of effecting the drainage will be provided for by means of the assessment of benefits to the owners of the lands to be benefited; that just compensation for property appropriated for the making of such a drain may be made in such benefits, or if there be no benefits to a particular owner of property taken, or if the benefits to such a person be not sufficient to make just compensation thereby to him, provision may be made for payment to him in money obtained by the assessment of benefits to other property beneficially affected.

It is by this statute made necessary to the establishment of a ditch thereunder, that the commissioners of drainage shall find that the costs, damages and expenses of effecting the drainage will be less than the benefits to the owners of the lands likely to be benefited by the proposed drainage; and it is made a cause for remonstrance, that it is not practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefit; and it is provided that if the finding of the court be in support of the remonstrance on this cause of remonstrance, the proceedings shall be dismissed. It is also provided that the commissioners shall estimate the costs, and assess the benefits or injury to each separate tract of land to be affected; and, under a remonstrance, the assessment made by the commissioners may be contested. It is further provided that the commissioner charged with the execution of the work shall pay the costs not otherwise adjudged, and expenses incident to establishing the work, and the damages assessed and the cost of construction, and shall assess, from time to time, upon the lands benefited ratably upon the amount of benefits as adjudged by the court, such sums of money as may be necessary therefor, not exceeding the whole benefits adjudged upon any one tract, and that he may require

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them to be paid in instalments, not exceeding twenty per cent. per month, at such times as he shall fix after thirty days' notice thereof. Whether the statute contemplates the payment of damages before the taking of property, or whether the taking of property under the statute is a taking not by the State, within the meaning of the constitutional provision that "No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered," we need not decide. No damages in excess of benefits were assessed to any of the appellants, and they have no interest in the question whether provision should be made for prepayment of damages to others.

It is further contended that in this statute there is a failure to comply with section 19 of article 4 of the Constitution, which requires that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The title of the act in question is "An act concerning drainage." The grounds of objection urged by the appellants are, that the statute provides for drainage over the lands of some persons for what the appellants claim to be the private benefit of other persons, and that it provides for the appointment of a board of drainage commissioners.

It seems to be very plain that this objection is not well taken.

"That the report of the commissioners is not according to law," is the second statutory cause of remonstrance in the circuit court, but it is not a proper assignment of error on appeal to this court.

The motion for a *venire de novo* is not mentioned in the briefs of counsel.

If a motion for a new trial be permissible in such a case, as to which see *Dukes v. Working*, 93 Ind. 501, we could not reverse the judgment upon the grounds of the motions in

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this case which have been mentioned in argument, which were that the court erred in overruling the motions for a trial by jury, and that the finding was not sustained by sufficient evidence.

The statute provides for the trial of the questions of fact by the court without a jury. That this provision is not in conflict with the constitutional requirement that "In all civil cases, the right of trial by jury shall remain inviolate," has been settled: *Anderson v. Caldwell*, 91 Ind. 451 (46 Am. R. 613); *Indianapolis, etc., Co. v. Christian*, 93 Ind. 360.

The appellants, in their discussion of the evidence, have not pointed out any sufficient reason for disturbing the result reached. The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed May 16, 1884. Petition for a rehearing overruled Sept. 25, 1884.

No. 11,603.

BROWN v. GOBLE.

JUSTICE OF THE PEACE.—Attachment.—Publication against Actual Resident.

—*Motion to Set Aside Judgment.—Appeal.—Jurisdiction.*—Where proceedings in attachment were instituted before a justice of the peace against a resident of this State, and upon an affidavit of non-residence publication was made and judgment entered on default, the judgment can not be set aside by the justice, upon a motion founded upon an affidavit of residence and want of notice, made after the time fixed by statute within which such motion must be made had expired; nor can the circuit court acquire jurisdiction of the matter by an appeal from the refusal of the justice.

SAME.—Void Judgment.—Relief in Equity.—A person against whom a judgment is rendered, valid only on its face, is entitled to be relieved from it, although the judgment is in fact void, but a justice of the peace has not the jurisdiction in an equity proceeding to grant such relief.

SAME.—In the decision of cases within their jurisdiction justices of the peace should act upon established principles of equity, but they can not assume jurisdiction of suits in equity.

From the Huntington Circuit Court.

97	86
196	390
197	513

97	86
130	285

97	86
134	643
135	213
136	110

97	86
149	556
149	559
151	208

97	86
160	215

97	86
166	656
167	156
167	159

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W. H. Trammel and *T. L. Lucas*, for appellant.

B. M. Cobb and *C. W. Watkins*, for appellee.

ELLIOTT, C. J.—On the 20th of August, 1883, the appellee instituted, before a justice of the peace, proceedings in attachment against the appellant, charging in the affidavit that the latter was not a resident of this State. Notice was given by publication, and on the 14th of September a default was entered and judgment rendered. On the 31st day of the following October the appellant filed a motion to set aside the judgment, supported by an affidavit alleging that he had no actual notice of the proceeding, and that he was a resident of Clear Creek township, Huntington county, at the time the action was begun. The justice set the time for hearing the motion and gave notice to the appellee, and upon the hearing denied the motion. On the 5th day of November, the day the ruling on the motion was made, the appellant filed an appeal bond, and the justice sent the case to the circuit court. On the 7th day of January, 1884, the appellee moved to dismiss the appeal, and on the 9th day of that month an order was entered sustaining the motion.

The affidavit filed by the appellant shows that the justice of the peace had no jurisdiction over him, and, therefore, makes out a very different case from that of a non-resident defendant asking relief from a judgment rendered upon constructive notice. If the appellant was, as the affidavit shows, a resident of the State, no jurisdiction of his person could be acquired by publication, for in such cases jurisdiction can, as a general rule, only be acquired by service of process. *Beard v. Beard*, 21 Ind. 321; *Johnson v. Patterson*, 12 Ind. 471; *Willman v. Willman*, 57 Ind. 500. The affidavit of the appellant shows a judgment rendered without jurisdiction of the person of the defendant, and such a judgment is invalid.

The person against whom a judgment is rendered, which appears to be valid, is entitled to be relieved from it, although it is in fact void. *Cain v. Goda*, 84 Ind. 209. It would be

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a gross perversion of justice to refuse aid to a party against whom a judgment was rendered in a case where no notice at all had been given him, and a notice wholly unauthorized by law is in legal contemplation no notice.

The appellant was entitled to relief upon the showing made by him, and the only question is whether the justice who rendered the judgment had jurisdiction to grant the relief. Justices of the peace have no general jurisdiction, nor have they any general equity powers. Their courts are courts of inferior and limited jurisdiction, and their powers are restricted to those which the statute confers. There is no general power to vacate or annul judgments, nor is there any general power to grant new trials. The power to grant new trials must be exercised pursuant to the statute and within the time limited, and defaults can only be set aside in the manner and within the time prescribed by statute. The motion in this case was not filed within the time prescribed for granting new trials or for setting aside defaults, and under the rule long settled by the decision of this court, the justice had no authority to entertain the motion. *Vogel v. Lawrenceburgh, etc., Co.*, 49 Ind. 218; *Foist v. Coppin*, 35 Ind. 471; *Smith v. Chandler*, 13 Ind. 513. The adjudged cases are strongly in support of this general doctrine. *Roberts v. Warren*, 3 Wis. 736; *Brown v. Kellogg*, 17 Wis. 475; *Crandall v. Bacon*, 20 Wis. 639; *White v. Conover*, 5 Blackf. 462; *Board, etc., v. State*, 61 Ind. 75; *Doctor v. Hartman*, 74 Ind. 221; *Board, etc., v. Logansport, etc., Co.*, 88 Ind. 199.

The courts of justices of the peace are not invested with equity jurisdiction, and can not assume jurisdiction and grant relief upon general equity principles as courts of general superior jurisdiction have power to do. *Ainsworth v. Atkinson*, 14 Ind. 538; *Snell v. Mohan*, 38 Ind. 494; *Richards v. Reed*, 39 Ind. 330; *Doyle v. State, ex rel.*, 61 Ind. 324. In the decision of cases within their jurisdiction justices of the peace should act upon and be ruled by established principles of equity, but they can not assume jurisdiction of suits in equity.

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The justice had no jurisdiction over the motion of the appellant, and the appeal to the circuit court did not confer jurisdiction upon that tribunal. *Doyle v. State, supra* ; *Jolly v. Ghering*, 40 Ind. 139.

The appellant is not, as his counsel contend, remediless under the former decisions of this court, for he can secure complete relief from the court of general superior jurisdiction. Courts of that class possess inherent equity powers, and may enjoin the enforcement of a judgment apparently valid but in fact void, and they may also declare the invalidity of such a judgment, and decree that it be annulled. *Nealis v. Dicks*, 72 Ind. 374 ; *Earle v. Earle*, 91 Ind. 27, see opinion, p. 35 ; *Cavanaugh v. Smith*, 84 Ind. 380 ; *Sanders v. State*, 85 Ind. 318 ; S. C., 44 Am. R. 29 ; *Little v. State*, 90 Ind. 338 (46 Am. R. 224), *vide* opinion, p. 339 ; 2 Pomeroy Eq., section 836.

The case before us is not one where there is a defective notice, but is one where there is no legal notice at all. Where there is a defective notice, and the court has passed upon its sufficiency, then, as a general rule, the judgment is not subject to review in a collateral attack. *Freeman* Judg. 126 ; *Muncey v. Joest*, 74 Ind. 409 ; *McAlpine v. Sweetser*, 76 Ind. 78 ; *Hume v. Conduitt*, 76 Ind. 598 ; *Stout v. Woods*, 79 Ind. 108.

The case in hand does not fall within the rule declared by the authorities cited, but falls within the rule established in the following cases : *Johnson v. Ramsay*, 91 Ind. 189 ; *Brickley v. Heilbruner*, 7 Ind. 488 ; *Grass v. Hess*, 37 Ind. 193 ; *Earl v. Matheney*, 60 Ind. 202 ; *Cain v. Goda, supra*.

The jurisdiction to annul the judgment is in the courts of superior general jurisdiction, as we have already seen and as the cases cited adjudge, and the appellant's course was not the proper one. Judgment affirmed.

Filed Sept. 19, 1884.

Vizzard v. Taylor, Treasurer.

No. 11,429.

VIZZARD v. TAYLOR, TREASURER.

JURISDICTION.—Collateral Attack.—The jurisdiction of an inferior tribunal, so far as to preclude collateral attack, must exist both over the subject-matter and over the parties.

NOTICE.—Constructive.—Actual.—Where the statute provides for constructive notice, a strict compliance with the statute as to the mode of giving such notice is essential. Actual notice will not supply any material deviation in the publication from what the statute prescribes.

DRAINAGE.—Notice by Auditor.—Name of Land-Owner.—Assessment on Land.—Injunction.—Case Overruled.—In proceedings for the establishment of a ditch, under the drainage act of March 9th, 1875 (1 R. S. 1876, p. 428), where the name of the owner of land assessed does not appear in the notice given by the auditor, nor in any of the proceedings before the county board, jurisdiction of the person is not obtained, and the assessment on the land is void and its collection may be enjoined. So much of the opinion in *Featherston v. Small*, 77 Ind. 143, as holds it unnecessary for the notice given by the auditor to contain the name of the owner of land affected by the ditch, is overruled.

From the Superior Court of Allen County.

J. Morris, C. H. Aldrich and J. M. Barnett, for appellant.

R. C. Bell, for appellee.

HAMMOND, J.—This was an action by the appellant to enjoin the appellee, as county treasurer, from collecting an assessment placed upon the appellant's lands by virtue of certain proceedings before the board of commissioners to establish a ditch. The appellee's demurrer, for want of facts, was sustained to the appellant's amended complaint. This ruling was excepted to and is assigned for error in this court. The facts stated in the amended complaint are, so far as they are material to an understanding of the case, as follows:

The appellant had been the owner and in possession of real estate, upon which the assessment complained of was made, since January 25th, 1875, at which time his deed from the former owner was duly recorded and the land transferred to his name for taxation upon the books of the county auditor. About September 1st, 1875, S. F. Baker and twelve

97	90
127	200
97	90
128	82
128	112
97	90
143	237

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others petitioned the board of commissioners of Allen county for the construction of a ditch, describing its proposed location. The ditch, as thus described, was not nearer than one mile, and, as finally constructed, not closer than sixty rods to the appellant's lands. The appellant's name was not mentioned in the petition for said ditch, in the notice given by the auditor, nor in any of the proceedings or assessments, but his lands were described therein as being owned by one David G. DeVore, who had no title or interest therein, and who was neither the tenant nor agent thereof. There was no finding of the county board that the appellant had notice as required by law, nor that he was in any way affected by the proposed work. The finding was, however, that said DeVore had been given the proper notice. The assessment was first placed upon the tax duplicate in DeVore's name and so remained two years, during which time appellant paid the taxes on his lands without knowledge of said assessment. In September, 1881, the county treasurer, discovering that DeVore did not own the lands and that they were owned by the appellant, caused the assessment thereon to be transferred upon the tax duplicate to the appellant's name. At the commencement of the action, the appellee, as such treasurer, was proceeding as provided by law to collect the assessment. The complaint avers, "that plaintiff did not stand by and consent to the construction of said ditch, and never had any knowledge or information of any kind that his lands had been described in said proceedings, or any of them, or that it was thought or supposed by any person that his said lands were benefited thereby; that said ditch was and is, and never can be of any benefit whatever to plaintiff's lands or any portions thereof, and if he had had any knowledge or information of the fact that his lands were described in any of said proceedings, he would have remonstrated and tried the questions arising thereunder; that by making the assessment and having all the proceedings (by and in pursuance of which the defendant threatens to sell plaintiff's lands) without no-

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tice to plaintiff as aforesaid, he has been prevented from having any opportunity to protect his rights, and his property is about to be taken, as he believes, without any process of law."

Appellant's complaint makes a strong case for equitable relief unless the facts stated show that he was bound by the assessment, on the ground of having had constructive notice of the proceedings to establish the ditch.

In *City of Philadelphia v. Miller*, 49 Pa. St. 440, it was said: "Notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property." A statute which provides for assessments upon real estate for drainage or other purposes, without notice to the owners thereof, so that they may in some way, if they choose, contest the validity or the amount of such assessments, is void, as being in conflict with constitutional inhibitions against taking property "without due process of law." *Campbell v. Dwiggin*s, 83 Ind. 473; *Rutherford's Case*, 72 Pa. St. 82 (13 Am. R. 655); *Butler v. Supervisors, etc.*, 26 Mich. 22; *Thomas v. Gain*, 35 Mich. 155 (24 Am. R. 535); *Darling v. Gunn*, 50 Ill. 424; *State v. Drake*, 33 N. J. 194; *Stuart v. Palmer*, 74 N. Y. 183 (30 Am. R. 289); *Cooley Taxation*, 266. The statute under which the proceedings were had to establish the ditch mentioned in the appellant's complaint, being the act of March 9th, 1875 (1 R. S. 1876, p. 428), is not, however, open to the objection of not providing for notice. After filing before the county board a petition for the construction of a ditch, drain or watercourse, and after viewers have made their report, the auditor is, by the second section of the act, required to give notice in a newspaper and by posting copies of such notice in a mode specifically set forth, "which notice shall contain a pertinent description of the terminus of such proposed work, its direction and course from its source to its outlet, and the names of the owners of the lands that will be affected thereby."

This statute was not complied with, nor did the county

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board find that it was complied with as to the appellant. His name did not appear in the notice given by the auditor. His lands were therein described as belonging to DeVore. They were so described in all the proceedings. We do not controvert the doctrine, well settled by many cases in this court, that the decision of an inferior tribunal upon a matter in which it has jurisdiction can not be assailed collaterally for errors or irregularities. But the jurisdiction, to be complete, so as to preclude collateral attack, must exist both as to the subject-matter and as to the parties. In a proceeding to establish a ditch, it is competent for the Legislature to prescribe what notice shall be sufficient. Where the notice provided for, as in the statute under consideration, is but constructive, strict compliance with the statute as to the mode of giving such notice is essential. It may be stated, generally, that where a statute makes the performance of any act constructive notice, the law must be carefully observed; thus, the recording of a written instrument not authorized to be recorded, or the recording of a deed or a mortgage, the execution of which has not been acknowledged or proved as the law requires, does not avail as constructive notice to any person.

In reference to notice by publication, a recent text-writer says: "As this manner of serving process, depends for its validity, more upon its strict conformity to the statute by which it is authorized, than upon any inherent probability of its conveying intelligence of the impending suit, to the party whose rights are to be affected, the fact that it has actually come to the knowledge of the defendant, can not be shown to supply any material deviation in the publication, from what the statute prescribes. The statute being in derogation of common law, is always strictly construed, and it must be shown affirmatively that its provisions have been complied with." Wade Notice, p. 451, section 1030.

The decisions of this court apply the rule laid down in the above quotation with great strictness. *Taylor v. Conner*, 7

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Ind. 115; *Fontaine v. Huston*, 58 Ind. 316; *Brenner v. Quick*, 88 Ind. 546. See, also, *Galpin v. Page*, 18 Wall. 350; *Jordan v. Giblin*, 12 Cal. 100; *McMinn v. Whelan*, 27 Cal. 300.

The appellant's name not appearing in the notice given by the auditor, nor in any of the proceedings before the county board, jurisdiction as to him was not acquired, and the assessment made upon his lands was void. A petition to establish a ditch under the act referred to is not required to contain the names of the owners of the land affected by the proposed work. *Watkins v. Pickering*, 92 Ind. 332. So, it would no doubt have been competent for the Legislature to have made the notice sufficient, by describing the lands affected, without naming the owners. But the statute is explicit that the names of the owners of the land affected by the proposed ditch must be contained in the notice. If this statute is not complied with, jurisdiction is not acquired as to the owners of lands whose names are omitted in the notice. *Wright v. Wilson*, 95 Ind. 408. And as the complaint alleges that the jurisdictional fact of notice as to the appellant was not found by the county board, the rule which closes the proceedings against collateral assault, where jurisdiction exists, does not apply to the present case.

The notice given by the auditor was, we think, insufficient as to the appellant; and as he alleges in his complaint, that his lands were in no way benefited by the ditch, and that he had no notice of the proceedings in time to appear before the county board to assert his rights, it seems clear that he is entitled to relief by injunction. There is no conflict in this view with *Town of Cicero v. Williamson*, 91 Ind. 541, nor *McIntyre v. Marine*, 93 Ind. 193, for it appears that the statutes there considered did not require the notices, the sufficiency of which was in dispute in those cases, to contain the names of the persons affected by the proceedings complained of. But the conclusions reached in *Wright v. Wilson*, *supra*, and in the present case, are in conflict, upon the point considered, with *Featherston v. Small*, 77 Ind. 143. So much of

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the last named case as holds that it was unnecessary for the notice given by the auditor under section 2 of the act of March 9th, 1875, *supra*, to contain the names of the owners of the lands affected by the proposed work, is overruled.

The judgment of the court below is reversed, with instruction to overrule appellee's demurrer to the amended complaint and for further proceedings.

Filed Sept. 17, 1884.

No. 11,713.

BRUNSON v. THE STATE.

CRIMINAL LAW.—*Information.*—*Affidavit.*—*Motion to Quash.*—An information based upon an insufficient and defective affidavit should be quashed on motion, as also the affidavit itself.

SAME.—*Obstructing Legal Process.*—An affidavit in a criminal prosecution, under section 2034, R. S. 1881, for freeing one under legal arrest, must charge that the defendants forcibly freed such person, knowing him to be under arrest.

From the Hamilton Circuit Court.

W. Booth, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, J.—Jesse Mendenhall made oath, before a proper officer, that on the 13th day of December, 1883, he was a duly elected, qualified and acting constable of Jackson township, in Hamilton county, in this State; that on that day one Edwin M. Tomlinson was found in a public place, to wit, on the streets and sidewalks of the town of Buena Vista, in said county of Hamilton, and in the view and the presence of him, the said Mendenhall, in an unlawful state of intoxication; that he, said Mendenhall, as such constable, then and there arrested said Tomlinson, "and immediately thereafter * * Franklin Brunson, Calvin Brunson and Zeph Achenbaugh, and then and there unlawfully, with force and arms, assaulting, beating and wounding affiant, and forcibly taking said

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Tomlinson from the custody of affiant, defendants then and there well knowing all the above facts.”

This affidavit having been deposited with the clerk of the Hamilton Circuit Court, the prosecuting attorney filed an information upon it, concluding with the charge that Franklin Brunson, Calvin Brunson and Zeph Achenbaugh freed Tomlinson from his arrest by then and there forcibly taking him from the custody of Mendenhall.

A motion to quash both the affidavit and information being first overruled, the court trying the cause acquitted Calvin Brunson and Achenbaugh, but found Franklin Brunson guilty as charged, and adjudged him to pay a fine of one hundred dollars.

Error is assigned here upon the decision of the court overruling the motion to quash the affidavit and information.

Section 2034, R. S. 1881, enacts that “Whoever obstructs the execution of any legal process, or who shall forcibly free any person from legal arrest knowing such person to be under arrest, shall be fined not more than ten thousand dollars nor less than one hundred dollars, to which may be added imprisonment in the county jail not exceeding one year.”

It may be that there has been some mistake in copying the affidavit as it was really made and filed, but, however that may be, we can only deal with that instrument as we find it in the record. As we thus find it, it does not charge either directly, or by any fair implication, that the defendants below forcibly freed Tomlinson from arrest. As regards any connection which those defendants may have had with the arrest of Tomlinson, the affidavit is confused and uncertain, and hence materially defective.

When the affidavit is insufficient, the information based upon it can not be sustained. *State v. Beebe*, 83 Ind. 171; *Strader v. State*, 92 Ind. 376.

The motion to quash ought, therefore, to have been granted both as to affidavit and information. *State v. Tuell*, 6 Blackf. 344.

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The judgment against Franklin Brunson is reversed, and the cause remanded for further proceedings consistent with this opinion.

Filed Sept. 16, 1884.

No. 11,747.

RICE ET AL. v. NIXON.

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125	381
126	128

BAILMENT. — *Contract.* — *Sale.* — *Warehouseman.* — *Commingling of Grain.* — *Negligence.* — Where a warehouseman receives grain to be stored for the owner, and places it in a common bin with his own and that received from other depositors, and sells from this receptacle, retaining always sufficient to supply each owner, the contract continues one of bailment, and the warehouseman is not liable for a loss resulting from an accidental fire not attributable to his wrong or negligence.

From the Fountain Circuit Court.

J. S. Nave, B. F. Hegler, W. S. Potter and A. A. Rice, for appellants.

T. F. Davidson, for appellee.

ELLIOTT, C. J.—The appellee was a warehouseman, and it was his custom to receive wheat on deposit and to place it in a common bin with wheat bought by him, and it was also his custom to sell wheat from this bin, but of this custom the appellants had no knowledge. In August, 1882, the appellant Victoria Rice deposited with the appellee two hundred and ten bushels of wheat; this was thrown into the common bin in accordance with the custom of the appellee, and with it was mingled wheat bought by him and wheat stored by other depositors, and from this bin wheat was sold, from time to time, but there was always in the bin wheat enough to supply all depositors, and at any time before the destruction of the warehouse by an accidental fire the appellant could have received from the bin all the wheat she had deposited. Some time after the storage of the wheat the

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warehouse and all its contents were destroyed by fire, but the fire was not attributable to the wrong or negligence of the appellee. No demand was made for the wheat until after its destruction. The wheat was stored with the appellee, and there was no agreement that the bailor should have an option to demand the grain or its value in money.

There are cases in which a bailee is responsible for the loss of goods where he commingles them with his own, but this principle does not apply where a warehouseman receives grain to be stored for the owner. Articles of such a character can be separated by measurement, and no injury result to the owner from the act of the warehouseman in mingling them with like articles of his own. This doctrine is older, at least, than *Lupton v. White*, 15 Vesey Jr. 432, for there Lord ELDON said: "What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person, mixing them, the other party can not tell, what was the original value of his property, he must have the whole." Chancellor Kent takes a like view of the question and his last editor, Judge Holmes, cites a great many cases upon the subject. 2 Kent Com. (12th ed.) 365, 590. This is the view taken by the text-writers and courts generally in cases where the deposit is made with a warehouseman. Story Bail., section 40; Law of Prod. Ex., section 152; 2 Schouler Pers. Prop., section 46; 6 Am. L. Rev. 457; 2 Blackstone Com., Cooley's ed., 404, *n.* There is, however, as shown by the cases cited, some conflict of opinion, but, as said in a late work, the great weight of authority is that the contract is one of bailment and not of sale, the warehouseman and the depositor becoming owners as tenants in common. Law of Prod. Ex., section 154, auth. *n.* 9.

To the authorities cited by the authors referred to may be added *Ledyard v. Hibbard*, 48 Mich. 421, S. C., 42 Am. R.

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474, *Nelson v. Brown*, 44 Iowa, 455, *Sexton v. Graham*, 53 Iowa, 181, *Nelson v. Brown*, 53 Iowa, 555, *Irons v. Kentner*, 51 Iowa, 88, S. C., 33 Am. R. 119, where the rule 'is carried much farther than is necessary in the present instance. The rule which we accept as the true one is required by the commercial-interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it can not be presumed that warehousemen in receiving grain for storage, or depositors in entrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, leads to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then, the fact that he puts it in a common receptacle with grain of his own and that of other depositors, does not make him a purchaser, and if he is not a purchaser, then he is a bailee. In all matters of contract the intention

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of the parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale. The duties, rights and liabilities of warehousemen are prescribed by the law as declared by the courts and the Legislature, and as matter of law it is known to us that a warehouseman, by placing grain received from a depositor in a common receptacle, and treating it as the usages of trade warrant, does not become the buyer of the grain, unless, indeed, there is some stipulation in the contract imposing that character upon him.

The cases in our own reports, cited by counsel for the appellants, do not oppose the conclusion here reached. In *Pribble v. Kent*, 10 Ind. 325, the defendants received of the plaintiff one hundred and thirty-two bushels of grain, and on demand failed to deliver the wheat, and it was held that an action would lie, but the contract was held to be one of bailment, and not of sale. It is plain, therefore, that in the case cited there was no such ruling as that asked by the appellants in the present case; on the contrary, the ruling overturns their theory. In *Ewing v. French*, 1 Blackf. 353, and *Carlisle v. Wallace*, 12 Ind. 252, the wheat was delivered to a miller to be ground into flour, and this was held to be a sale, on the ground that the character of the article was to be entirely changed, and a new and different article was to be given by the miller to his customer in return for the wheat. In the last of the cases cited the option of demanding wheat, flour or money was vested in the depositor, so that he had the option of making the contract one of bailment or one of sale, and he exercised that option by treating the transaction as a sale. In the case under examination there was no option, for it is expressly found that the wheat was received by the warehouseman for storage. The case of *Ashby v. West*, 3 Ind. 170, holds that one who delivers wheat to be manufactured into flour is the owner of the flour, and may maintain replevin, the court saying: "We are clearly of the opinion that that

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contract is one of bailment, and not of sale," and this is against the contention of the appellants.

In deciding that the contract was one of bailment, and not of sale, we determine the only debatable question in the case, for it has been long settled that where property in the custody of a bailee is destroyed by an accidental fire, and there has been no fault or negligence on his part, he is not liable.

We have examined the rulings on the demurrers to the answers and think they were correct, but if we were wrong in this there could be no reversal, because the special finding clearly shows the ground on which the judgment rests, and from this it appears that if the rulings were erroneous the errors were harmless. Judgment affirmed.

Filed Sept. 17, 1884.

No. 11,490.

97	101
148	108

THE STATE, EX REL. ANDERSON, v. SOHN.

CITY.—Street Commissioner.—Appointment.—Tenure of Office.—The services of a street commissioner may be dispensed with by the common council of a city, under the act of March 6th, 1877, and when this is done for one year, and said officer is then reappointed, his term of office commences from the time of his reappointment.

SAME.—Removal of Street Commissioner.—Reappointment.—Vacancy.—Where such officer was appointed on the 7th of May, 1879, removed May 12th, 1879, reappointed May 10th, 1880, served till March 15th, 1882, and a successor was appointed May 8th, 1882, such successor was entitled to hold such office for two years from his appointment, and hence a person, whom the common council appointed to such office on May 8th, 1883, is not entitled to the office, because there was no vacancy at the time of his appointment.

From the Floyd Circuit Court.

J. H. Stotsenberg and *A. Dowling*, for appellant.

J. V. Kelso, for appellee.

BEST, C.—This proceeding is upon an information in the nature of a *quo warranto*, brought to determine the relator's

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right to the office of street commissioner of the city of New Albany now held by the appellee.

A demurrer was sustained to the information, and this ruling is assigned as error.

The material facts averred in the information are these, that the city of New Albany is and for more than fifteen years has been an incorporated city; that it is and has been acting under the general law for the incorporation of cities, approved March 14th, 1867, and the various acts amendatory and supplemental thereto, including the eighth section of the act of March 6th, 1877; that in pursuance of the last named act the common council of said city, on the 7th day of May, 1879, duly appointed David W. Miller street commissioner of said city, which appointment said Miller accepted, and he was duly qualified; that on the 12th day of May, 1879, the common council of said city "by resolution dispensed with the services of a street commissioner for one year from the said 12th day of May, 1879;" that on the 10th day of May, 1880, the common council of said city appointed the said David W. Miller street commissioner, and he continued to act and "perform the duties of the office, without any new appointment or election, until the 15th day of March, 1882, when he died;" that from his death until the 8th of May following the city marshal discharged the duties of street commissioner; that on the day last named the common council of said city appointed the appellee street commissioner, which appointment he accepted, qualified, is in possession of the office and claims to be the legal street commissioner of said city; that on the 7th day of May, 1883, the common council of said city duly appointed the relator, who then was and still is a citizen of said city, street commissioner; that he accepted such appointment, duly qualified, and ever since has been ready and willing to enter upon the discharge of his duties, but that the appellee has intruded himself into said office, retains the same and refuses to surrender it, etc.

The eighth section of the act of March 6th, 1877, pro-

The State, *ex rel.* Anderson, v. Sohn.

vides that "The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, assessor, treasurer, civil engineer, street commissioner and marshal, and, if the common council deem it expedient, a city attorney, and a city judge. The city attorney, the street commissioner, and civil engineer shall be appointed by the common council: *Provided*, That the common council may dispense with the street commissioner, and require the marshal to perform his duties. All such officers shall hold their respective offices for two years, and until their successors are elected and qualified, except as herein provided. * * * The city attorney, street commissioner, and civil engineer, two years each, subject to removal by said common council at their pleasure."

All of the above section applicable to the facts stated in the information is set out. From the portion set out it will be seen that a street commissioner holds his office for two years unless, in the language of the statute, the common council dispense with or remove him. The relator insists that the order of the council dispensing with the services of Miller was not a removal, and consequently he continued to hold the office from his first appointment until his death notwithstanding such order; that the first two years was the term of his office, and the residue of the time was a portion of the succeeding term; that the appellee was appointed during the second term, and consequently was only entitled to hold the residue of such term, which expired on the 10th of May, 1883, when the relator was appointed. The appellee, on the other hand, contends that the resolution of the common council dispensing with Miller's services, terminated his appointment, and that when he was again appointed in May, 1880, his term of office began and continued until his death, on March 15th, 1882; that the appellee's appointment, after the expiration of the vacancy created by the death of Miller, was for a full term, and consequently there was no vacancy at the time of the relator's appointment, and therefore he is

O'Connor v. The State.

not entitled to the office. The latter view we adopt. The order of the common council dispensing with Miller's services as street commissioner was a removal from office. This power the council possessed, and it was exercised, according to the averments of the information, in substantial conformity to the statute. The council possessed no power to suspend him or release him from the discharge of his duties and still retain him in office. *Mitchell v. Wiles*, 59 Ind. 364.

Having no power simply to suspend him, its action in dispensing with his services as street commissioner must be deemed a removal from office. This was the construction the common council and Miller himself placed upon its act by his reappointment and its acceptance, and we think that under the statute this act is not susceptible of any other construction. This being true, Miller's term under his second appointment did not terminate until the appellee's appointment, and consequently there was no vacancy when the relator was appointed. There being no vacancy he was not entitled to the office, and hence the court properly sustained the demurrer to the information. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the relator's costs.

Filed Sept. 18, 1884.

No. 11,346.

O'CONNOR v. THE STATE.

CRIMINAL LAW. — *Indictment.* — *Name.*—An indictment should not be quashed because in the caption the middle letter of the defendant's name is inserted between the christian and surname, and omitted in the body of the indictment.

From the Jasper Circuit Court.

O'Connor v. The State.

J. W. Douthit, for appellant.

M. H. Walker, Prosecuting Attorney, and *J. H. Phares*, for the State.

ZOLLARS, J.—Appellant was indicted and convicted under section 2098, R. S. 1881, on a charge of having given away, on Sunday, intoxicating liquors to be drunk as a beverage.

We are asked to reverse the judgment upon the action of the court below in overruling the motion to quash the indictment. The contention is that the indictment is bad, because in the title or caption the name of the defendant is given as Dennis P. O'Connor, and in the body of the indictment as Dennis O'Connor.

The statute now provides, as did the statute of 1852, that the indictment must contain the title of the action, specifying the name of the court and the names of the parties. Section 1731, R. S. 1881; 2 R. S. 1876, p. 383.

Under the statute of 1852 it was held that if the name of the defendant appears in the body of the indictment, the omission to name him in the title is a defect which can not prejudice his rights upon the merits, and that hence a judgment should not be reversed on account of such omission. *Dukes v. State*, 11 Ind. 557. See, also, *West v. State*, 48 Ind. 483.

If the name of the defendant may be omitted altogether from the title of the cause, it would seem to follow that the use of a middle letter should not render the indictment bad.

It has been held, also, that the law knows but one christian name, and that where one christian name is stated, the initial middle letter may be rejected as surplusage. *Choen v. State*, 52 Ind. 347 (21 Am. R. 179). See, also, *Hess v. State*, 73 Ind. 537; *Miller v. State*, 69 Ind. 284; *Schofield v. Jennings*, 68 Ind. 232.

These rulings are in consonance with the statutes upon the question of criminal practice. It is provided by section 1755, R. S. 1881, that no indictment shall be quashed on account of any defect or imperfection which does not tend to the prej-

 Bottenberg v. Nixon.

udice of the substantial rights of the defendant upon the merits.

It is further provided that no indictment shall be quashed for any surplusage or repugnant allegations, when there is sufficient matter alleged to indicate the crime and person charged. Section 1756, R. S. 1881.

It is also provided that in the consideration of questions which are presented upon appeal in criminal cases, the Supreme Court shall not regard technical errors, defects, or exceptions to any decision or action of the court below which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant. Section 1891, R. S. 1881.

It is difficult to see how the matter complained of here could in any way mislead appellant, or in any way affect his substantial rights; clearly it did not.

The judgment is affirmed, with costs.

Filed Sept. 18, 1884.

 No. 11,711.

BOTTENBERG v. NIXON.

BAILMENT.—Warehouseman.—Conversion.—Accidental Fire.—To a suit against a warehouseman for conversion of grain stored with him to his own use, he answered that the course of business was to deposit grain received in a common bin, containing grain owned by defendant and that deposited by others, and to sell to others and to deliver to depositors from this bin, and that plaintiff was informed of this custom; that there was always sufficient grain in the bin to answer all demands; and that before demand by plaintiff the warehouse and contents were destroyed by fire without fault of defendant.

Held, that the answer was sufficient, as there was no conversion, the loss not being attributable to the defendant.

SAME.—Accident.—Negligence.—The warehouseman is bound to keep sufficient grain on hand to respond to all demands of depositors in quantity and quality as received, unless excused by some accidental destruction of the grain without fault on his part.

SAME.—Evidence.—In such action it was proper to introduce proof of the quantity of wheat in the bin at the time of the accidental fire.

97	106
126	331
97	106
144	433

Bottenberg v. Nixon.

PLEADING.—*Answer in Confession and Avoidance.*—An answer in confession and avoidance is good if the facts show there was no such wrong as alleged in the complaint.

PRACTICE.—*Specific Objections to Evidence.*—*Bill of Exceptions.*—Specific objections to evidence must be stated to the trial court, and these objections must be set forth in a bill of exceptions, to present any question to the Supreme Court.

From the Fountain Circuit Court.

A. A. Rice, B. F. Hegler, J. S. Nave and W. S. Potter, for appellant.

T. F. Davidson, for appellee.

ELLIOTT, C. J.—The first and second paragraphs of the appellant's complaint charge that the appellee received from the appellant a large quantity of wheat to be stored, and that the appellee wrongfully converted it to his own use. The third paragraph does not charge a conversion in direct terms, but does set forth a contract of bailment and a failure to deliver the wheat on demand. The first paragraph of the appellee's answer was the general denial; the second paragraph admits the receipt of the wheat, and alleges that the appellee was engaged in the business of conducting a warehouse and of buying, selling and shipping grain; that the course of business was to deposit all grain received from depositors in a common bin with wheat bought by the appellee, and that from this bin wheat was taken and sold by him; that the appellant knew of this custom; that the appellee had in the common bin at all times, before October 8th, 1882, sufficient wheat of the kind deposited by the appellant to replace that received, and that on that day the warehouse and all its contents were destroyed by fire without any fault or negligence on the part of the appellee.

The principal question presented by the ruling of the court on this answer was decided in *Rice v. Nixon*, ante, p. 97, where we held that the contract was one of bailment, and that in the absence of negligence the bailee was not responsible for the loss of the wheat by an accidental fire. We there gave

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the question a full and careful consideration, and do not deem it necessary to again discuss it.

We think that the facts stated show that there was no conversion, for they show that the loss of the wheat was due to an accidental fire, not attributable to the fault of the bailee. An answer in confession and avoidance is good if the facts stated in it are such as show that there was no such wrong as that alleged as the cause of action, and that is the case here; for it is shown that the wheat was not lost to the bailor by any wrongful act of the warehouseman, but was lost by a casualty for which he was not responsible. In such a case as this a wrongful conversion is the gravamen of the action, and when the facts pleaded show that there was no wrongful conversion, a defence is made out. The law, as we showed in *Rice v. Nixon, supra*, allows the warehouseman to use grain from the common receptacle, and the bare fact that he did use it can not be deemed a conversion.

The answer reaches the third paragraph of the complaint, because it shows that the grain was destroyed before the demand was made. The demand was not made until December, 1882, and before that time the wheat had been destroyed.

Instruction number three states the law as ruled in *Rice v. Nixon, supra*, and is, therefore, unobjectionable.

Instruction number eight is said by appellant's counsel to be wrong, upon the question of the burden of proof, in that it places the burden upon the appellee; but, granting this to be true, still the appellant has no cause of complaint. In our opinion, however, counsel are in error in asserting that the warehouseman is not bound to keep sufficient grain on hand to meet the demands of depositors. We understand that he is bound to do this, and that if he fails to respond to a demand by delivering wheat in quantity and quality such as that received he is liable, unless some accident, not attributable to his fault or negligence, caused the destruction of the grain.

It appears from what has been said in discussing the ques-

Wright, Administrator, v. Julian *et al.*

tions arising on the instructions, that there was no error in permitting appellee to prove the quantity of wheat in the bin when the warehouse was destroyed.

It has been many times decided that specific objections to evidence must be stated to the trial court, and that these objections must be set forth in the bill of exceptions. *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98), and authorities cited. The grounds of the objection to evidence of custom do not appear in the present bill of exceptions, and for this reason there is no question before us. Judgment affirmed.

Filed Sept. 18, 1884.

No. 10,391.

97 100
136 686

WRIGHT, ADMINISTRATOR, v. JULIAN ET AL.

DEMURRER TO EVIDENCE.—Practice.—If there is any evidence favorable to the party demurring to the evidence, it can not be considered or weighed against evidence, the tendency of which is against such party.

SAME.—Inference.—If, from the evidence, the jury might infer that the plaintiff's action should be sustained, a demurrer should be overruled and the plaintiff should have judgment.

From the Marion Circuit Court.

W. W. Herod and *F. Winter*, for appellant.

HAMMOND, J.—This was an action by the appellant as administrator of the estate of John B. Julian, deceased, against the appellee John W. Julian, for the appointment of a receiver to take charge of the assets of a partnership alleged to have existed between the decedent and said appellee. The widow of the decedent was also a party defendant, but made default. Issues were joined between the appellant and the appellee John W. Julian, and submitted to a jury for trial. After the appellant introduced his evidence, the appellee John W. demurred to it. The jury was discharged; the demurrer was sustained, to which ruling the appellant excepted, and

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judgment was rendered in favor of the appellees for costs. This ruling is assigned for error.

The evidence is set out in the demurrer. We have examined it with care. It does not make out a very satisfactory case in favor of the appellant, but, at the same time, tends to prove every material allegation of the complaint.

It is well settled by the decisions of this court that a demurrer to evidence admits the truth of every fact of which there is any evidence at all. It also admits all inferences which could fairly and logically be deduced from such facts by a jury. If there is any evidence favorable to the demurring party, it can not be considered or weighed against evidence, the tendency of which is against such party. If, from the evidence, the jury might infer that the plaintiff's action should be sustained, the demurrer should be overruled and the plaintiff should have judgment. *McCreary v. Fike*, 2 Blackf. 374; *Doe v. Rue*, 4 Blackf. 263 (29 Am. Dec. 368); *Stanford v. Davis*, 54 Ind. 45; *Pinnell v. Stringer*, 59 Ind. 555; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134); *Lemmon v. Whitman*, 75 Ind. 318 (39 Am. R. 150); *Trimble v. Pollock*, 77 Ind. 576; *Fritz v. Clark*, 80 Ind. 591; *Ruff v. Ruff*, 85 Ind. 431; *Ruddell v. Tyner*, 87 Ind. 529; *Kincaid v. Nicely*, 90 Ind. 403.

If, in this case, the jury had passed upon the evidence and returned a verdict for the plaintiff, this court, upon appeal, could not hold that the verdict was not sustained by sufficient evidence. In such case a demurrer to evidence should be overruled.

Reversed with costs, with instructions to overrule the demurrer to the evidence and for further proceedings.

Filed Sept. 19, 1884.

Sellers v. Beaver, Treasurer, et al.

No. 11,485.

SELLERS v. BEAVER, TREASURER, ET AL.

RAILROAD.—*Tax Aid.—Donation.—Failure to Complete Road.—Forfeiture.—**Repeal of Statute.—Statute Construed.*—The provisions of section 2 of the supplemental act of 1873, p. 184, and the amendment of said section in 1875, R. S. 1881, section 4069, are inconsistent with the provisions of section 18 of the act of May 12th, 1869, R. S. 1881, section 4062, for the absolute forfeiture of the appropriation to a railroad company by failure to complete the work within a definite period, though the appropriation was made as a donation.**SAME.**—*Subscription for Stock.*—Section 4094, R. S. 1881, does not provide for the declaring of any forfeiture for failure to complete a railroad within a particular time, and there is no statute that annuls the subscription of a county or township to the stock of a railroad company simply because the road is not completed within a given time.**SAME.**—*Complaint.—Allegation.*—“*Legally Commenced.*”—An allegation that the railroad company did not legally commence work is not equivalent to an averment that the company failed to commence work upon its road within two years from the levying of the tax.**STATUTES.**—*Construction of Forfeitures.*—Statutes providing for forfeitures are to be strictly construed.

From the Huntington Circuit Court.

J. B. Kenner, J. I. Dille, D. C. Anderson and Z. T. Dungan,
for appellant.*W. O. Johnson, J. S. Slick, J. C. Branyan, L. P. Milligan,*
M. L. Spencer, — Kaufman and W. A. Branyan, for appellees.

BLACK, C.—This was a suit brought by the appellant against the appellees, Henry Beaver, treasurer of Huntington county, and Huntington township in said county. The complaint was in two paragraphs, and the question of the sufficiency of the facts stated therein is the only one before us.

It was alleged, in effect, in each paragraph, that the Chicago and Atlantic Railway Company was duly organized under the laws of this State, in 1871; that said township voted to take stock in said company, in a sum stated; that at the June sessions in 1878 and 1879 of the board of commissioners of said county, said board levied a special tax on all the

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taxables of said township, in a specified sum, at each of said sessions, to aid said railway company in the construction of a railroad through said township, and caused the auditor of said county to enter said special tax upon the tax duplicate of said county for that purpose; that the plaintiff then owned real and personal property in said township of the aggregate value for taxation purposes of a sum stated; that said auditor apportioned of said taxes against said property, for the years 1878 and 1879, the sum of \$95.75; that said special tax, with penalties and interest, had been carried forward, year after year, on the tax duplicate, by the auditors and treasurers of said county; that the defendant Beaver was treasurer of said county, and said duplicates were in his hands as such treasurer. It was alleged that said company forfeited its right to have or demand said money so appropriated or any part thereof remaining uncollected. In the first paragraph the following alleged reasons for such forfeiture were stated: 1. Said company failed to complete its line of railway ready for use through said township within three years from the levy of said taxes, or at any time since; and said board of commissioners did not give one year's further time in which to complete the same. 2. Said company did not legally commence work upon said railway in said township within one year after said levy. 3. Said company did not construct and complete its said railway through said township, or the entire road, ready for use, within five years from March 7th, 1877, or within five years from July 2d, 1877. 4. Said company failed to commence work legally upon its road within two years from the levy of said tax.

In the second paragraph, the grounds of forfeiture stated were, in effect, the same as the third ground stated in the first paragraph.

It was alleged in each paragraph that said treasurer was proceeding to collect said tax; that the plaintiff was the owner of certain personal property described; that said Beaver, as such treasurer, had levied upon it and had advertised it for

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sale, and threatened to sell it, and would sell it unless restrained. For what purpose the treasurer had levied on said property was not clearly stated in the first paragraph, but in the second it was alleged that he had so levied for the purpose of collecting said tax. Prayer for an injunction restraining said treasurer from making said sale or collecting said tax.

By section 18 of an act of May 12th, 1869, to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies (R. S. 1881, section 4062), it was provided that a failure on the part of the railroad company to commence work upon the railroad in the county within one year from the levying of such special tax, or failure to complete such railroad ready for use within three years from such levying, should forfeit the rights of such company to such "donation," unless the county commissioners, for good cause shown, should give not to exceed one year's further time in which to complete the same, and that the money raised by said special tax should go into the general funds of the county or township, as the case might be, and be used accordingly.

By section 3 of an act of December 24th, 1872, supplemental to said act of 1869 (R. S. 1881, section 4067), it was provided as follows: "In all cases where the levies of taxes have been made in pursuance of said act" of 1869, "and remain uncollected, and such railroad company has failed to commence work on, or to complete such railroad as required by said act, the taxpayers or parties against whom said levies stand charged shall be released and discharged from the payment thereof."

Upon these statutory provisions are predicated the first two of the supposed grounds of forfeiture stated in the complaint.

The provision for forfeiture in said section 18 was, by its terms, applicable only to appropriations by way of donation, and the failures therein contemplated could not work a forfeiture of an appropriation by way of taking stock, such

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as that involved in this case. This restriction of the forfeiture to donations was noticed by this court in *Board, etc., v. Indianapolis, etc., R. W. Co.*, 89 Ind. 101, *Caffyn v. State, ex rel.*, 91 Ind. 324, *State, ex rel., v. Board, etc.*, 92 Ind. 499.

Furthermore, as was shown in *Wilson v. Board, etc.*, 68 Ind. 507, the Legislature, by section 2 of the supplemental act of 1873, Acts 1873, p. 184, and the amendment of said section 2 in 1875, R. S. 1881, section 4069, adopted an entirely different policy in relation to the forfeiture of such appropriations because of failure to complete the road within a particular period; and it was held in the case last mentioned that said act of 1873 worked the repeal of the provision of said section 18 of the act of 1869, for the forfeiture of the appropriation by failure to complete the road within the time limited in said section 18, and also the provision of said section 3 of said act of December 24th, 1872, that upon failure of the railroad company to complete its road within the time so limited, the taxpayers and parties against whom the levies stood charged should be released and discharged from the payment thereof.

By said section 2 of said act of 1873, as amended in 1875, provision is made whereby if, within five years after the tax has been placed upon the duplicate, the railroad company shall not have expended in the actual construction of the railroad in the county or township an amount of money equal to the amount of money to be donated or stock to be taken in the railroad company, the board of commissioners of the county may, in their discretion, annul and cancel the appropriation, upon the application of twenty-five freeholders of the county, after the giving of notice. And it is provided that whenever it is shown, to the satisfaction of the board of commissioners, that the amount of work done by the railroad company is equal to the stock taken or donation made, it shall be the duty of said board to order the tax to be collected at once, as though it had never been suspended.

These provisions are plainly inconsistent with the provi-

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sion of said section 18 for the absolute forfeiture of the appropriation by the failure to complete the railroad within a definite period, though the appropriation were made by way of donation.

In stating the second supposed ground of forfeiture, it was alleged that "said railway company did not legally commence work upon said railway in said township within one year after the levy of said pretended special levy of taxes."

The allegation that the company did not legally commence work is not equivalent to an allegation that it did not commence work, and it is subject to the objection that a conclusion of law is pleaded. *Wilson v. Board, etc., supra.*

Furthermore, statutes providing for forfeitures are to be strictly construed, and if it were needed it might be held that an allegation that the company did not commence work in the township would not be equivalent to an allegation that it did not commence work in the county.

In 1877 the Legislature enacted (section 4094, R. S. 1881) that "Any railroad company now organized under the laws of the State of Indiana, to which any township has made or may hereafter make an appropriation of money, to aid such company in constructing a railroad in or through such township, by taking stock in or donating money to such company, shall have five years from the passage of this act in which to complete such railroad for use, and when so completed, such company shall be entitled to such appropriation: *Provided*, That this act shall not be so construed as to entitle any company to such appropriation that has failed to commence work upon its road within two years from the levying of the special tax for such purpose."

The third and fourth supposed grounds of forfeiture stated in the complaint were based upon this enactment of 1877, March 7th, 1877, being the date of the approval of the act, and July 2d, 1877, being the date at which the statute became in force.

The purpose of this statute, as indicated by its title, was

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to extend the time for the completion of railroads in all cases where townships had made, or might thereafter make, an appropriation of money to aid any railroad company in constructing its road; and the statute, in the body thereof, related to a particular class of railroad companies, being restricted to railroad companies then organized. It was provided that such a company should have five years from the passage of the act in which to complete its railroad for use, and that when so completed such company should be entitled to the appropriation.

Thus far the statute did not enact any forfeiture, or provide for the declaring of any forfeiture for failure to complete the railroad within a particular period. A forfeiture for such a failure, if there be any, must be found in some other statute. But, as we have seen, the only other statute providing for an absolute forfeiture on such ground related only to appropriations by way of donation, and it had been repealed.

And it was said by this court in *State, ex rel., v. Board, etc., supra*, that "there is no statute that annuls the subscription of a county or township to the stock of a railroad company simply because such company does not complete its road within a given time."

So far as the proviso of this statute is concerned, it is sufficient for this case to say that the complaint did not allege that the railway company concerned failed to commence work upon its road within two years from the levying of the tax, but it alleged that said company failed to commence work "legally," etc., which, whatever be the proper effect of the statute, must, upon what has been said above, be held to not bring the case within the meaning of the statute.

The complaint was insufficient, and the judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, it is ordered that the judgment be affirmed, at the appellant's costs.

Filed Sept. 18, 1884.

Wood *et al.* v. Franklin *et al.*

No. 11,481.

WOOD ET AL. v. FRANKLIN ET AL.

97	117
165	151

CIRCUIT COURT.—Appointment of Judge Pro Tem.—Notice.—Record.—Statute Construed.—Where the regularly elected judge of a court declines to try a cause on account of relationship to one of the parties, and appoints another judge to try the cause, under the act of March 1st, 1855, 2 R. S. 1876, p. 10, no written appointment of the trial judge is required, and the notice to secure his attendance is not required to be made a part of the record.

SAME.—Presumption.—Where, in case of such appointment, a judge of a court of record appears at the time designated and tries the cause, the Supreme Court will presume it to have been upon proper notice and by competent authority.

SAME.—Adjourned Term.—Supreme Court.—Presumption.—Under section 1333, R. S. 1881, providing for adjourned terms of courts, the Supreme Court will presume that the court specified the manner of the notice, but it is not required to be in the adjourning order.

From the Owen Circuit Court.

I. H. Fowler, for appellants.

J. C. Robinson and *S. O. Pickens*, for appellees.

BICKNELL, C. C.—The appellants brought this suit to set aside certain judgments of the Owen Circuit Court, and a sale of their land on execution, and a deed made by the sheriff, and to recover from the appellees, as heirs of the purchaser, damages for the detention of the land, and to quiet the title to the land.

The issue, arising upon a general denial, was tried by the court, who found for the defendants, and after overruling the plaintiffs' motion for a new trial, rendered judgment for the defendants, from which the plaintiffs appealed.

The only questions arising upon the appeal are:

1. Had Newton F. Malott, judge of the twelfth judicial circuit, authority to hold the Owen Circuit Court and render the judgments complained of?

2. Was the adjourned term of the Owen Circuit Court, commencing on the 5th day of August, 1873, illegally held,

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so that the judgments rendered at such adjourned term were void?

Questions were made on the trial as to the admissibility of some of the evidence, and the rulings of the court thereon were presented as reasons for a new trial, but these reasons are not discussed or even mentioned in the appellants' brief, and are therefore regarded as waived.

It appeared that at the May term, 1873, of the Owen Circuit Court, the suit, in which the judgments complained of were afterwards rendered, was on the docket, and that an amended complaint was filed therein, which the defendants were ordered to answer, and that on the 14th judicial day of said term the following entry was made in said suit:

"Now come the parties by their attorneys in the several causes hereinafter entitled and numbered in the regular order in which they stand upon the docket, and by agreement the said causes are passed to the adjourned term of the court to commence on the 5th day of August, 1873, as follows, to wit." Then followed a list of said causes in which were the number and title of the suit in which the judgments complained of were afterwards rendered, to wit: "No. 92, *William Franklin et al. v. Willis W. Wood et al.*"

It appeared that on the 14th of June, 1873, the said May term of the Owen Circuit Court was adjourned by the following order entered on the record:

"Ordered, that court now adjourn until the 5th day of August, 1873, owing to the regular time for said term having expired, and the business thereof not being complete."

It appeared that prior to said agreement, and prior to said adjournment, and after said order upon the defendants to answer, said cause No. 92 was set down for trial before Judge N. F. MALOTT, of the twelfth judicial circuit, because the judge of said Owen Circuit Court was of kin to one of the plaintiffs in said cause.

It appeared that on said 5th day of August, 1873, the said

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adjourned term of said Owen Circuit Court was duly opened by the judge of the Owen Circuit Court, and that on the same day said Newton F. Malott appeared and held the court for the trial of said cause No. 92, and continued the same by adjournment from day to day until the fifth day of said adjourned term, on which day said cause No. 92 was tried and the judgments complained of were rendered before said Newton F. Malott.

The appellants say that Newton F. Malott was not appointed in writing, and, therefore, had no authority to hold said court.

The proceedings were governed by the act of March 1st, 1855, 2 R. S. 1876, p. 10, sections 1 and 2.

The subsequent acts of March 5th, 1859, Acts 1859, p. 139, and of March 17th, 1861, Acts 1861, p. 49, are amendments of other statutes, and provide for those cases only in which a change of venue is granted on the application of either party; they do not change the provisions hereinafter stated of sections 1 and 2 of said act of 1855.

Section 1 of the act of 1855 authorizes a circuit judge to decline to preside in a cause when he is related to any of the parties.

Section 2 of the act of 1855 authorizes the judge in such a case to appoint a time in vacation for the trial of such cause, and to give at least ten days' notice thereof to some other judge of a court of record, and provides that such other judge, so notified, shall, at the time designated, attend at the usual place of holding courts in said county, and preside in said cause, etc.

There is nothing in these provisions which required an appointment in writing of such other judge. The statute makes any other judge of a court of record competent to preside. He derives his power from the statute, and not from the notice. The object of the notice is to secure the attendance of a competent judge, and it is not a part of the record. *Benjamin v. Evansville, etc., R. R. Co.*, 28 Ind. 416.

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The appellants claim, also, that Judge Malott's appointment was revoked, and that the Hon. Solon Turman, judge of the thirteenth judicial circuit, was appointed to hold the court.

The following entry in the record was in evidence :

" *William Franklin et al. v. Willis W. Wood et al.*

" Now come the parties, by their attorneys aforesaid, and it appearing that the judge of this court is of kin to the plaintiff William Franklin, this cause is set down for trial before the Hon. Solon Turman, judge of the thirteenth judicial circuit of the State of Indiana."

The appellants say that the record plainly discloses the fact that Newton F. Malott was first appointed and afterwards the appointment was revoked, and Judge Turman's name was substituted.

But, under the act of 1855, *supra*, it was not necessary to name any judge ; when the record showed that the judge of the Owen Circuit Court had declined to preside, by reason of kinship, then any other judge of a court of record, having ten days' notice, was required by the statute to hold the court for the trial of said cause ; and as Newton F. Malott was a judge of a court of record, and as he appeared and held the court at the time fixed, the presumption is that he received the proper notice, and that he had competent authority. *Kennedy v. Phillipy*, 91 Ind. 511, and cases there cited. This court knows judicially who are the circuit judges of this State. *Zonker v. Cowan*, 84 Ind. 395.

The appellants claim that the adjourned term was not properly held, because it does not appear that any public notice thereof was given. They say that the act of February 12th, 1855, R. S. 1881, section 1333, provides that public notice of such adjournment " shall be given in some manner, to be specified by said court ;" and they claim that, for want of such notice, the court had no jurisdiction at said adjourned term, and all its proceedings were void.

In *Hanes v. Worthington*, 14 Ind. 320, and in *Shirts v.*

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Irons, 28 Ind. 458, this court said: "The statute fully authorizes the court to hold an adjourned term for the purpose of completing the business undisposed of; and, the contrary not appearing, we will presume that the court was regularly held and the cause properly brought to trial."

In the present case the adjourned term was held at the time appointed, and the court had a right to adjourn to a day in vacation for the completion of its unfinished business; and it does not appear that the court failed to specify the manner in which notice of the adjourned term should be given, nor does it appear that such notice was not given. The entire record of the Owen Circuit Court, at the May term, 1873, was not in evidence; detached parts only of such record were proved.

The specification by the court of the mode of notice was not in the adjourning order, but it was not required to be there; it might appear elsewhere.

The statute, R. S. 1881, section 1333, requires that the time for the adjourned court shall be specified in the adjourning order, and that is all; the manner of the notice may be specified in a previous order (*Washer v. Allensville, etc., Co.*, 81 Ind. 78); or in a subsequent order entered *nunc pro tunc*. *Green v. White*, 18 Ind. 317. And if sufficient notice be given, the adjourned term will be legal although the court made no order as to notice. *Conrad v. Johnson*, 20 Ind. 421. The record not showing the contrary, the presumption is that the adjourned term was lawfully held.

We find no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Sept. 18, 1884.

Engle v. The State.

No. 11,669.

ENGLE v. THE STATE.

INTOXICATING LIQUOR.—*Sale to Habitual Drunkard.*—*Notice by Wife.*—*Citizen.*—*Statute Construed.*—Section 2093, R. S. 1881, requires that the notice therein referred to, regarding the selling or giving of intoxicating liquor to a person who is in the habit of becoming intoxicated, must be given by a citizen of the township or ward in which the person referred to resides, and an averment that the wife of a citizen of such township or ward has given such notice is not sufficient.

CRIMINAL LAW.—*Defective Affidavit.*—*Information.*—Where the affidavit is essentially defective, the defect extends with equal fatality to the information based thereon.

From the Huntington Circuit Court.

B. F. Ibach, for appellant.

G. W. Gibson, Prosecuting Attorney, and *J. M. Hildebrand*, for the State.

NIBLACK, J.—This was a prosecution upon affidavit and information under section 2093, R. S. 1881. The affidavit was in two counts, and the venue of the offences charged was laid in Huntington county in this State.

The body of the first count was as follows:

“Eliza Ricker, being sworn, on her oath says that one Andrew Engle, late of said county, on the 15th day of January, 1883, at said county and State aforesaid, did then and there unlawfully sell a less quantity than a quart, to wit, one half pint of intoxicating liquor, to wit, one half pint of beer, at and for the price of five cents, to one David H. Ricker, who was then and there, at the time of such sale, a person in the habit of being intoxicated, after notice in writing had been given him, the said Andrew Engle, on May 19th, 1879, by Eliza Ricker, who was then and there the wife of the said David H. Ricker, a citizen of Huntington township in said county, that he, the said David H. Ricker, was a person in the habit of being intoxicated.”

The second count was in substantially the same language,

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except that it charged Engle with having *given* intoxicating liquor to Ricker, after notice as alleged in the first count.

The information was, also, in two counts, following and responsive to the counts of the affidavit.

A motion to quash both the affidavit and information being first overruled, a jury found Engle guilty as charged in the second counts of the affidavit and information respectively, fixing his punishment at a fine of \$100, and judgment followed upon the verdict.

In its natural order the first question presented here is, Did the circuit court err in overruling the motion to quash the affidavit and information?

Section 2093, *supra*, declares that "Whoever, directly or indirectly, sells, barter, or gives away any spirituous, vinous, malt, or other intoxicating liquor to any person who is in the habit of being intoxicated, after notice shall have been given him, in writing, by any citizen of the township or ward wherein such person resides, that such person is in the habit of being intoxicated, shall be fined not more than one hundred dollars nor less than fifty dollars, to which may be added imprisonment in the county jail not more than one year nor less than thirty days, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period." This section is a substitute for section 10 of the act of March 17th, 1875, relating to the sale of intoxicating liquor (1 R. S. 1876, p. 869), which was in force on the 10th day of May, 1879, the day on which the notice in writing referred to in the affidavit is alleged to have been given. By a reference to this latter section it will be observed that the notice contemplated by it might be given by a wife, child, parent, brother or sister of the person who was in the habit of being intoxicated; whereas the notice now provided for must be given by a citizen of the township or ward in which the person so in the habit of being intoxicated resides.

As we construe the affidavit, it declares David H. Ricker to have been a citizen of Huntington township, in Hunting-

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ton county, but is silent as to the citizenship of Eliza Ricker, his wife, who gave Engle the notice relied on for a conviction in this case. Certain qualifications, or attributes, are necessary to confer citizenship, either within the State or within the United States, as the case may be, and citizenship of the husband does not of itself confer citizenship upon the wife.

A wife may reside for years, or for a lifetime, with her husband without thereby acquiring citizenship in the township or ward in which he is domiciled, or, indeed, within the State of his residence.

An averment, therefore, that the wife of a citizen of some particular municipality has performed a specific act, is not the equivalent of an averment that the act was performed by a citizen of that municipality.

For these reasons we feel constrained to hold that the failure of the affidavit to aver that Eliza Ricker was also a citizen of Huntington township, in Huntington county, was a material omission, and hence fatal to the sufficiency of the affidavit.

It may be contended that the averment of citizenship, following the name of David H. Ricker, ought to be construed as applying to Eliza Ricker, the wife. But that construction would leave the affidavit without any allegation as to David H. Ricker's place of residence, which would be as fatal to its sufficiency as the construction we have placed upon it.

When, as in this case, the affidavit is essentially defective, the defect extends with equal fatality to the information resting upon it. *State v. Beebe*, 83 Ind. 171; *Strader v. State*, 92 Ind. 376; *Brunson v. State*, ante, p. 95.

Our conclusion necessarily is that the motion to quash the affidavit, as well as the information, ought to have been sustained.

The judgment is reversed, and the cause remanded for further proceedings.

Filed Sept. 20, 1884.

The State v. Dixon.

No. 11,845.

97	125
145	219

THE STATE v. DIXON.

CRIMINAL LAW.—Indictment.—Return into Open Court.—Supreme Court.—Record.—An indictment should be quashed, or a motion in arrest of judgment sustained, if the indictment was not returned into open court by the grand jury. On appeal to the Supreme Court, where such a motion has been sustained, the record must show affirmatively that the indictment was returned into open court.

SUPREME COURT.—Correction of Record.—Certiorari.—The settled practice of the Supreme Court forbids the correction of the record after a case has been decided.

From the Greene Circuit Court.

F. T. Hord, Attorney General, and *J. D. Alexander*, Prosecuting Attorney, for the State.

HAMMOND, J.—The State appeals in this case from the decision of the court below in sustaining appellee's motion to quash the indictment. An instrument without any title, but purporting to be an indictment, is copied into the transcript, but how or by what means it obtained a place among the records of the court below, does not appear. It is not shown to have been returned into open court by the grand jury. As the record comes to us, we are not able to say that there was error in quashing the indictment. Sections 1670 and 1672, R. S. 1881; *Adams v. State*, 11 Ind. 304; *Springer v. State*, 19 Ind. 180; *Heacock v. State*, 42 Ind. 393; *Mitchell v. State*, 63 Ind. 276. The law is settled in the cases cited that an indictment should be quashed, or a motion in arrest of judgment sustained, if the indictment was not returned into open court by the grand jury, and that, upon appeal to this court, the record must show affirmatively that it was so returned. It may be that the court below sustained the motion to quash for the reason that the indictment was never, in fact, presented by the grand jury. Be that as it may, it devolves upon a party bringing a case to this court to show from the record

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that there was error in the decision complained of. In the absence of such showing, this court will indulge all reasonable presumptions in favor of the correctness of the decision. Affirmed.

Filed Sept. 20, 1884.

ON PETITION FOR A REHEARING AND MOTION FOR CERTIORARI.

HAMMOND, J.—Counsel for the State accompany their petition for a rehearing with a motion to have the clerk of the court below certify to this court certain portions of the record alleged to be omitted in the transcript. No objection, so far as the record before us is concerned, is made to our decision. The settled practice of this court forbids the correction of the record after a case has been decided. *Warner v. Campbell*, 39 Ind. 409; *Pittsburgh, etc., R. R. Co. v. VanHouten*, 48 Ind. 90; *State, ex rel., v. Terre Haute, etc., R. R. Co.*, 64 Ind. 297.

Both the petition and motion will have to be overruled.

Filed Oct. 16, 1884.

No. 11,389.

CROY v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

INTERROGATORIES TO JURY.—*Special Findings.*—*General Verdict.*—In order that the special findings of a jury in answer to interrogatories may control the general verdict, they must be irreconcilably inconsistent therewith.

SAME.—*Material Facts.*—In order to entitle the plaintiff to a judgment on the special findings notwithstanding the general verdict, all material facts must appear in the finding.

RAILROAD.—*Injury to Cattle.*—*Evidence.*—*Venue.*—*Jurisdiction.*—In a suit against a railroad company for injury to cattle by cars, proof must be made that the injury occurred in the county where suit is brought. This is a jurisdictional fact.

SAME.—*Direct Injury.*—In such a suit there must be proof of direct injury—proof that the animal was actually touched by the locomotive or cars.

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SAME.—Fences.—Private Way to Highway.—Where a railroad company has no right by fencing in its track to exclude proprietors from their private passage to the highway, it is not liable under the statute for injury to cattle.

From the Montgomery Circuit Court.

G. W. Paul, M. D. White and J. E. Humphries, for appellant.

A. D. Thomas, for appellee.

BLACK, C.—The appellant brought his action against the appellee to recover, under the statute, damages for the injuring of cattle by running a locomotive and train of cars upon them.

A general verdict for the defendant was returned, with answers to interrogatories, which were propounded to the jury by each party. The plaintiff moved for judgment upon the answers to the interrogatories, notwithstanding the general verdict. This motion was overruled, as was also the plaintiff's motion for a new trial.

In order that the special findings of a jury in answer to interrogatories may control the general verdict, they must be irreconcilably inconsistent therewith.

To entitle the plaintiff to recover, it was necessary that there be proof of the fact, alleged in the complaint and denied in the answer thereto, that the animals were injured in the county in which the action was brought. *Evansville, etc., R. R. Co. v. Epperson*, 59 Ind. 438; *Louisville, etc., R. W. Co. v. Breckenridge*, 64 Ind. 113; *Louisville, etc., R. W. Co. v. Davis*, 83 Ind. 89. This jurisdictional fact was not shown by the special findings.

The statute, R. S. 1881, section 4025, *et seq.*, gives the right of action for the killing or injuring of animals by the locomotives, cars or other carriages used on the railroad, and this is construed to require proof of direct injury—proof that the animal for the killing or injuring of which action is brought was actually touched by the locomotive, cars or other carriages. *Indianapolis, etc., R. W. Co. v. McBrown*, 46 Ind. 229; *Louisville, etc., R. W. Co. v. Smith*, 58 Ind. 575.

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It was not shown by these special findings, that the animals were struck, or touched, or killed, or injured by the locomotive, cars or other carriages, or even that they were injured or killed upon the railroad track.

Unless all the material facts of the cause of action were proved, the verdict could not be otherwise than for the defendant. We can not look to the evidence in reviewing the ruling upon a motion for judgment on the answers of the jury to interrogatories, notwithstanding the general verdict.

Facts necessary to the plaintiff's recovery not being shown by the special findings, he could not have judgment thereon over the general verdict for the defendant.

The evidence showed that the animals entered upon the railroad at night, by escaping from the plaintiff's enclosed field in which they were pasturing; that the fence along the east side of this field, over which the animals passed, was a good rail fence, maintained by the plaintiff, nine or ten rails high, and such a fence as was used by good husbandmen of the neighborhood; that at the place where the animals entered, this fence was twenty-four feet from the railroad track, and that a fence extended in an unbroken line along the west side of the railroad for about three-fourths of a mile northward and the same distance southward from the place of entry. The railroad, constructed many years before, was located, by permission of the board of county commissioners entered of record, upon a State road leading from Crawfordsville to Lafayette, commonly known as "the turnpike." There was also a fence east of the railroad opposite the place where the cattle entered and about forty-eight feet distant from the railroad track, and this fence, like that on the west side, extended northward and southward to intersecting county roads running east and west, the place being called "Croy's Lane." There was no evidence of a vacation of this State road; on the contrary, it was shown that it was still used as a highway and worked as such by the road supervisors. At the place where the animals entered, the wa-

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gon track ran along on the east side of the railroad track and about twenty-five feet from it. At the distance of a half a mile southward, the wagon track crossed the railroad track and ran along the west side thereof. The fences along this highway were situated substantially as they were when the railroad was constructed, and the adjoining proprietors continued to use the highway and had no other outlet from their farms. Immediately opposite the place where the animals entered, the railroad ran through a cut three and one-half feet deep, and the track of the railroad could not be used for the passage of wagons thereon.

Counsel for the appellant insist that the appellee was liable, under the statute, because the railroad was not "fenced in" by means of fences on both sides of the railroad track connected with cattle-guards and separating it from the wagon-track.

It is not necessary to decide a question argued by counsel, whether under the statute a railroad company is liable for killing or injuring by its train animals which entered upon the railroad by passing over a good fence extending along one side of the railroad, and not maintained by the railroad company, at a place where it was possible to fence in the railroad without interference with the rights of the public or those of the railroad company, but it was not fenced in.

Before this railroad was constructed, the place upon which the appellant's cattle entered was a public highway, over every part of which travellers were entitle to pass. When the railroad company made its track there, it had no right to further obstruct the highway by erecting fences and constructing cattle-guards thereon.

A railroad company is liable for failure to fence private ways. *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380. But the appellee had no right by fencing in its track to exclude the proprietors along the Croy Lane from the use of the highway or to close their private passage ways to and from it.

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This court has already decided that at the particular place where the appellant's animals were injured, the appellee is not bound to fence in its right of way, and that the appellee is not liable under the statute for killing or injuring animals there. *Louisville, etc., R. W. Co. v. Francis*, 58 Ind. 389; *Louisville, etc., R. W. Co. v. Wyson*, 58 Ind. 597.

The cases of *Louisville, etc., R. W. Co. v. White*, 94 Ind. 257, and *Louisville, etc., R. W. Co. v. Shanklin*, 94 Ind. 297, did not overrule the cases above cited from 58 Ind., but were decided upon a state of facts, shown by the evidence, different from those upon which this decision proceeds.

As there could be no recovery by the appellant under the evidence, it is wholly immaterial whether or not there was any error in the giving or refusing of instructions to the jury.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the appellant's costs.

Filed June 19, 1884. Petition for a rehearing overruled Oct. 11, 1884.

No. 11,431.

LOVERING ET AL. v. KING ET AL.

MORTGAGE.—*Foreclosure of.—Complaint.—Decedents' Estates.—Personalty.—Parties.—Heirs.*—Where it appears upon the complaint for the foreclosure of a mortgage, that the personal estate of the decedent mortgagor is liable for the payment of the mortgage debt, and that the suit was brought before the expiration of a year after the issuing of letters of administration and the giving of notice thereof, a demurrer should be sustained for want of sufficient facts. Sections 621, 2331, 2378, R. S. 1881.

SAME.—*Failure to Appoint Administrator.—Next of Kin.—Creditor.—Presumption.*—If the next of kin do not select an administrator, any creditor may do so; and a failure to select an administrator does not warrant the presumption that the decedent left no personal property.

From the Clark Circuit Court.

P. H. Jewett and *C. L. Jewett*, for appellants.

A. F. Ayres and *A. B. Cole*, for appellees.

97	130
126	344
126	501
97	130
151	588
97	130
170	669

Lovering et al. v. King et al.

BICKNELL, C. C.—In December, 1882, the appellees, who are husband and wife, filed their complaint against the appellants to foreclose three mortgages of land in Clark county.

The complaint stated that the mortgages were executed by Amos Lovering and Mary S. Lovering, and had become the property of the plaintiff Nancy King by assignment; that said Amos Lovering died in 1880 intestate; that there had been no administration on his estate, and that his only heirs were the said Mary S. Lovering and Annie Lovering; that the defendant Eugene Frazer claimed some interest in the land adverse to the plaintiffs.

The exhibits annexed to the complaint showed express promises by the said decedent to pay the money secured by said mortgages, so that the remedy of the plaintiffs was not confined to the mortgaged land, but the personal estate of the decedent was liable for the mortgage debts.

The complaint demanded judgment against the defendants for the amount due on each of the mortgages, and for foreclosure and for all proper relief.

The defendants Mary S. Lovering and Annie Lovering jointly, and the defendant Frazer separately, demurred to the complaint for want of facts sufficient. These demurrers were overruled by the court, and the rulings thereon are assigned as errors.

A statute enacted in 1881, which is now section 2331, R. S. 1881, is as follows: "No proceeding shall be instituted before the end of one year from the issuing of letters testamentary or of administration and the giving of notice thereof, as required in this act, to enforce the lien of any judgment rendered against the decedent in his lifetime, upon his real estate, or any decree specifically directing the sale of such real estate to discharge any lien or liability created or suffered by the decedent; nor shall any suit be brought before that time, against the heirs or devisees of the deceased, to foreclose any mortgage or other lien thereon, for the payment of which his personal estate shall be liable."

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The mortgages exhibited in the complaint were such that the personal estate of said decedent was liable therefor; the complaint was filed before the appointment of an administrator; the averment is "no administration has yet been had."

A like prohibition to that contained in section 2331, *supra*, is found also in section 621, R. S. 1881; it seems to be the policy of the law that heirs shall not be compelled to litigate about the debts of their ancestors until after the expiration of a year from the issuing of letters testamentary or of administration and of notice thereof.

In general, the liability of heirs is regulated by the statutes, R. S. 1881, sections 2442 to 2453, and sections 621 to 624. Ordinarily, there is no personal liability of heirs for the debts of their ancestor, where there has been no administration. *Leonard v. Blair*, 59 Ind. 510; *Carr v. Huette*, 73 Ind. 378. A creditor must enforce his claim against a decedent through an executor or administrator, and if there be no administrator, the creditor may have one appointed. R. S. 1881, section 2227.

The action can not be maintained by the creditor against the heirs of the decedent, when the complaint states that the decedent left personal property. *North-western Conference v. Myers*, 36 Ind. 375. Nor when the complaint states that the decedent was insolvent, and left no property except the real estate in controversy. *Carr v. Huette, supra*.

But where the action is merely to foreclose a mortgage made by a decedent, his heirs are the proper parties, and his administrator is not a proper party, because, in such a case, there is no claim against the personal estate of the decedent; but whenever, in addition to the land, the complaint seeks to appropriate the personal assets, of which the administrator is the representative, then the administrator is a necessary party. *Slaughter v. Foust*, 4 Blackf. 379; *Muir v. Gibson*, 8 Ind. 187.

Formerly, such an action for foreclosure merely might have been maintained against the heirs of the deceased mortgagor,

Lovering *et al.* v. King *et al.*

whether an administrator had been appointed or not; but since the statute, R. S. 1881, section 2331, took effect, such an action can not be maintained, if the mortgage be such that the personal estate of the deceased is liable therefor, until the expiration of a year from the time of the issuing of letters testamentary or of administration, and notice given thereof.

Where such a mortgage is shown by the complaint, and the complaint also shows that such time has not elapsed, there is no cause of action. The law declares that such suits shall not exist, or, in other words, that there shall be no cause of action. A demurrer to such a complaint for want of facts sufficient ought to be sustained.

The appellees claim that the failure to appoint an administrator warrants the presumption that the decedent left no personal property. But the law does not authorize such a presumption from such a fact.

The appellees also claim that if the statute, section 2331, *supra*, be enforced, the heirs of an intestate mortgagor may forever prevent the foreclosure of the mortgage by merely neglecting to have an administrator appointed; but the answer to this is that if the next of kin do not select an administrator any creditor may. *Wilson v. Davis*, 37 Ind. 141; R. S. 1881, section 2227.

The court below erred in overruling the demurrers to the complaint in this case, because it appears upon the complaint, that the personal estate of the decedent mortgagor is liable for the payment of the mortgage debts, and that this suit was brought before the expiration of a year after the issuing of letters of administration and the giving of notice thereof. See R. S. 1881, section 2378.

The judgment ought to be reversed for the aforesaid errors, and this result renders it unnecessary to consider the other errors assigned.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same

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is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to the court below to sustain the demurrers to the complaint.

Filed Sept. 20, 1884.

No. 11,146.

COOK v. WOODRUFF ET AL.

MORTGAGE.—Foreclosure.—Evidence.—Letters.—Payment.—Receipt.—Where real estate was sold and notes and mortgage given for purchase-money, and the property transferred and laid off in lots, and a portion resold and bonds and notes taken upon such sales, it was proper under an answer of payment, on trial of the foreclosure suit, the principal owner of the property being dead, to permit the introduction in evidence of a letter from the father of the deceased, to the plaintiff, enclosing a receipt by the plaintiff's attorney to the deceased for a sum of money in excess of the amount of the mortgage debt, said sum having been paid at the request of the plaintiff, and the letter connecting the payment with the mortgage and being admitted with other evidence in relation to the transactions of the parties.

SAME.—Examination of Plaintiff as Witness.—Letters of Agent of Defendant.—Death of Principal Defendant.—It was also proper, while the plaintiff was under examination by the defendants as a witness on their behalf, to allow the introduction of letters to the plaintiff from one acting as agent of the principal owner before his death, and himself interested in the mortgaged property, in regard to the sale of the lots and the application of the proceeds upon the mortgage debt. The letters were relevant, and the plaintiff, being upon the witness stand, had full opportunity for explanation, and if the letters were immaterial he could not be injured by their introduction. The principal owner being dead, and the defendants, relying chiefly upon the testimony of the plaintiff, aided by such additional evidence as they could find, were entitled to a liberal use of such evidence as was in any way competent and relevant to the issue.

SAME.—Application of Proceeds of Sales.—Proof having been introduced that an arrangement had been made with plaintiff, that he was to receive the proceeds of lots sold and to release a lot from the lien of the mortgage for every one thousand dollars received, and a large amount of such proceeds being received in bonds, the defendants were entitled to examine the plaintiff as to his application of money subsequently received upon such bonds. So, also, the plaintiff was subject to an examination in

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regard to an indemnifying bond executed by parties in interest to secure the payment of the bonds received on the sale of the lots.

SUPREME COURT.—Evidence.—Exceptions Waived.—Where the questions put to a witness under examination and excepted to are not the ones discussed on appeal in the Supreme Court, the exceptions are considered as waived.

SAME.—Instructions.—Exceptions to Special.—Where the instructions given, considered together, are full, complete and without contradiction, and contain a fair exposition of the law as applicable to the case, objections to one or more of them taken separately will not be considered.

SAME.—Verdict.—Evidence.—When there is evidence clearly tending to support the verdict, it will not be disturbed on the evidence alone.

From the Superior Court of Marion County.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

B. Harrison, C. C. Hines, W. H. H. Miller and J. B. Elam, for appellees.

FRANKLIN, C.—Appellant, Cook, commenced a suit in the Marion Superior Court to foreclose a mortgage upon certain real estate executed by appellees William Daggy, Otway Allen and Moses McLain, on the 11th day of September, 1872, to one John F. Reed, to secure the payment of two several promissory notes, each for \$45,693.33½, with interest at six per cent., payable in one and two years, with Addison Daggy, Joseph Allen, Jr., and William M. Wheatley as sureties thereon. The notes and mortgage had been assigned by said Reed to the plaintiff, on the 27th day of February, 1873. The real estate mortgaged had been sold and conveyed, subject to the mortgage, by the mortgagors, to one James O. Woodruff, who had the same platted and laid off into city lots as an addition to the city of Indianapolis. These lots had been purchased by a number of individuals, and over one hundred of such purchasers are made defendants to this complaint. Appellee E. Delevan Woodruff was one of the principal owners and interested parties in the property. James O. Woodruff, the principal proprietor of the mortgaged property, known as the "Woodruff Place," died be-

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fore the trial of the suit, and in a few days after its commencement. As a defence to the foreclosure of the mortgage the said E. Delevan Woodruff and other defendants pleaded payment of the debt and satisfaction of the mortgage, while other defendants pleaded a release of their lots from the mortgage, but the principal defence, and the one discussed by counsel is payment.

There was a trial by jury, and verdict for defendants. Over a motion for a new trial judgment was rendered for the defendants. Cook appealed the case to the general term, where the judgment of the special term was affirmed, and he has appealed to this court.

The error assigned in this court is the affirmance by the general term of the judgment of the special term.

There were a number of errors assigned in the general term, but the only one relied upon by appellant and discussed by counsel is the overruling of the motion for a new trial. And the only reasons for a new trial urged in this court are the admission of illegal testimony, error in instructions, and the insufficiency of the evidence to sustain the verdict.

The first objection insisted upon, to the introduction of evidence, is in relation to a letter by Harmon Woodruff to the plaintiff, dated March 11th, 1873, enclosing a receipt from Avery to James O. Woodruff for \$300. Avery was the attorney of the plaintiff, and the money appears to have been paid at the request of the plaintiff. The letter connects the transaction with the mortgage, and in connection with the other evidence in relation to the transaction of the parties, we think there was no error in admitting the letter and receipt in evidence.

The next objection is to the introduction in evidence of two letters written by P. C. Woodruff to the plaintiff, dated respectively, July 25th and July 31st, 1873. P. C. Woodruff appeared to be interested in the "Woodruff Place," and was transacting business for his brother James O. Woodruff in relation to the "Woodruff Place." The letter dated July

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25th appears to be in answer to one written by the plaintiff, and was in reference to the sale of lots in the "Woodruff Place," and applying the proceeds thereof upon plaintiff's mortgage; the letter of the 31st of July is in further explanation of the same matter. These letters were relevant to the investigation of the plaintiff's mortgage and its payment. The plaintiff was upon the witness stand at the time of their introduction in evidence, and was examined as a witness in relation to them, and had full opportunity to give all necessary explanations. But it is objected, that the letters were immaterial; if so, with plaintiff's full opportunity to explain, we do not see wherein he was injured by their introduction in evidence.

The principal in the "Woodruff Place" transactions was dead, and the defendants, for a defence to the mortgage, had to rely mostly upon the testimony of the plaintiff himself, aided by such additional evidence as they could find. Hence a liberal use of such other evidence as was in any way competent and relevant to the case should be allowed. We think these letters were connected with the transaction of the business in controversy, and were admissible in evidence.

The next objection is to permitting an examination of the plaintiff in relation to whether any money paid by James O. Woodruff, or for him by others, had been applied upon \$64,000 of bonds and notes which the plaintiff had previously received in payment upon the mortgage.

The parties had made an arrangement that as the lots in Woodruff Place were sold the proceeds of the sales should be applied on plaintiff's mortgage, and for every thousand dollars of such proceeds so turned over to the plaintiff, he was to release one of the lots from the mortgage, under which arrangement, prior to July, 1875, he received in payment upon his mortgage the \$64,000, in bonds and notes, as the proceeds of sales of the lots, and the testimony objected to was as to whether he did, after so receiving said notes and bonds, apply other moneys afterwards paid to him by said

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James O. Woodruff, or others for him, upon said notes and bonds. We think this was a proper examination, and that the testimony was admissible.

Some time after the \$64,000 in notes and bonds were received, \$60,000 thereof being in bonds, plaintiff took from Harmon Woodruff and Paul C. Woodruff an indemnifying bond for the \$60,000 in bonds. And while the plaintiff, as a witness in the case, at the instance of defendants, was being examined by the defendants, he was examined in relation to this indemnifying bond, which examination was objected to by the plaintiff. This bond recites the execution of the original notes and mortgage to Reed, their transfer to the plaintiff, an indemnifying bond against loss on the mortgage executed by Harmon Woodruff and Paul C. Woodruff, together with James O. Woodruff and Daniel Macauley, the \$60,000 in bonds received thereon, and guarantees to plaintiff the payment of said bonds.

We think this was a part of the transaction in controversy between the parties, and as such was competent evidence, and there was no error in permitting the plaintiff to be examined as a witness in relation to it.

The next objection is to permitting E. Delevan Woodruff to testify as to a conversation between him and his brother James O., had in the absence of the plaintiff.

E. Delevan Woodruff, Paul C. Woodruff and James O. Woodruff were all sons of said Harmon Woodruff, and the plaintiff was their uncle; these three sons and the father were interested in the "Woodruff Place" property. In July, 1878, E. Delevan Woodruff made a trip to Europe to see the plaintiff in relation to his mortgage upon the "Woodruff Place," and met him in London, where he had a conversation with the plaintiff in relation to the mortgage, in which he told the plaintiff that his brother James said the mortgage was overpaid between four and five thousand dollars. Mr. Cook answered that he did not know about that; that he had not his papers with him; but that he was out of pocket a large

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amount of money; and in explanation he said he had taken from James for the release of lots, money, bonds and mortgages, and other things in lieu of money, which had not panned out as he anticipated, and that he was loser to a large amount; that he had taken these things in lieu of money and released a lot for each thousand dollars so received. Witness then asked him to release the property from his mortgage or assign the mortgage so he could enter satisfaction upon the record, which plaintiff declined to do, unless they would make good by payment of all the securities that he had received from James.

James died June 6th, 1879, and his father and Paul C. had been invalids for some time, and incapable of transacting business.

The foregoing is gathered from the examination in chief of E. Delevan Woodruff, as a witness upon the trial of the cause; and upon cross-examination by plaintiff's counsel he was asked as to what time he had the conversation with James which he undertook to detail to Mr. Cook; he answered in the spring before he went to Europe of the same year. He further testified that in the conversation with the plaintiff at London, the plaintiff said nothing about any settlement, or what accounts had been credited; that he (witness) knew nothing of any settlement; that Mr. Cook, in the conversation at London, did not admit the mortgage was paid off, nor deny it; he avoided the question. He gave Mr. Cook no specific statement showing that the mortgage was paid off; he only stated to him generally that James said it was more than paid off. Witness was then asked by plaintiff's counsel: "When James made that communication to you, did he not tell you anything about the settlement that had taken place before? Answer. No, sir."

This question was repeated as to each one of several alleged settlements, and answered in the same way. These questions and answers were in relation to the conversation with James which he had referred to in the conversation with Mr. Cook

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at London. Upon re-examination he was asked by defendant's counsel the following question :

" Mr. McDonald asked what James said to you when he told you that he had overpaid Mr. Cook as he thought four or five thousand dollars. What did he tell you as to how Mr. Cook had dealt with him about this, if you recollect ; if he went into a statement at all, what did he tell you ? "

This question was objected and excepted to, but was only answered by the witness, by asking the question whether it was " before he went to Europe ? " Then the following question was asked him : " Yes, you were inquired all about that. I will ask you if James told you how it was that the mortgage had been overpaid four or five thousand dollars. What did he say as to that ? " To which the witness answered : " He said Mr. Cook had been very hard on him, and had taken everything he had got, and it was blood money, blood money, and he said I have paid him blood money enough to pay half his mortgage. "

This question and answer were not objected or excepted to, and the answer to this question is the one objected to by appellant's counsel and discussed in his brief in this court.

There is no exception of record upon which this question can be presented.

The questions which the record shows exceptions to are not the ones discussed in this court, and they are therefore considered as waived. We find no available error in the admission of testimony.

The next reason urged for a new trial is alleged error in the instructions of the court to the jury. The instructions are too lengthy to copy in an opinion ; we have examined them carefully, and, taking them all together, we think they are full, complete, and without contradiction, and contain a fair exposition of the law as applicable to the case. In such cases, objections to one or more of them, taken separately, will not be considered available. *Western Union Tel. Co. v. Young*, 93 Ind. 118 ; *Pennsylvania Co. v. Rusie*, 95 Ind. 236.

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Upon an examination of the evidence, we think there was testimony clearly tending to support the verdict of the jury, and in such cases this court will not disturb the verdict upon the evidence alone.

We find no available error in the record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below in general term be and the same is in all things affirmed, with costs.

Filed Sept. 20, 1884.

No. 11,564.

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97	141
140	219
97	141
144	607

NEGLECT.—*Common Carrier.—Ferryman.*—Where one engaged in the business of a ferryman for hire receives for transportation a wagon and horses in charge of a driver, the responsibility of the ferryman is not that of a common carrier in exclusive custody of goods, but he is liable for injury occurring through his neglect to provide reasonably safe and convenient means for the departure of horses and vehicles from the boat, the driver being without fault contributing to the injury.

SPECIAL FINDING.—*Burden of Issue.—Material Facts.*—A party who has the burden of the issue can not have a judgment unless all the facts essential to a recovery are stated in the special finding or verdict.

From the Vermillion Circuit Court.

T. F. Davidson, for appellant.

J. Jump and *C. W. Ward*, for appellee.

BLACK, C.—The appellant brought his action against the appellee to recover damages for an injury to a horse of the plaintiff, occasioned by the negligence of the defendant. There was an answer of general denial, and upon a trial by the court a special finding was rendered, to the conclusions of law in which the plaintiff excepted. He also moved, unsuccessfully, for a new trial.

The court found “that on the 21st day of November, 1883, and for more than fifteen years prior thereto, the defendant

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was engaged in running a ferry-boat for hire, for the ferriage of persons, teams, stock and freight across the Wabash river at the town of Perrysville; that the defendant's ferry-boat was an ordinary ferry-flat, forty feet in length and eight to ten feet in width, having at each end an apron, or platform, extending across the boat, and three or four feet in width, used to anchor the boat to the shore and to make the entrance to and exit from the boat more safe and convenient for teams and vehicles; that the apron was attached to the boat by strap hinges, and there was a space of two and one-half inches intervening between the boat and the apron. The court further finds that on said 21st day of November, 1883, the plaintiff drove his team of horses, attached to a wagon loaded with wheat, upon the defendant's ferry-boat, for the purpose of being ferried across from the east to the west bank of the river; that the stream was safely crossed, and the boat anchored to the western shore of the river, and the plaintiff was directed by the defendant to drive his team off the boat, and that he undertook to do so; that as the team was in the act of crossing the apron from the boat to the shore, one of the plaintiff's horses became frightened at some object on the shore or boat, and shied, crowding the other animal off into the mud and water; that the horse still remaining upon the apron, in his struggles, slipped the small part of his leg, that part between the pastern-joint and the knee, into the crack between the apron and the boat; that this was done from the outer side of the apron; that it was not possible for the horse to get his foot down through the crack; that while the animal's leg was so fastened in the crack, he lunged forward and broke it, totally destroying the usefulness and value of the animal, and it thereby became necessary to kill him. The court further finds that the animal was of the value of one hundred dollars, and that the plaintiff retained the custody and control of his team while on the defendant's boat; that he exercised due care and caution in its management, and paid the defend-

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ant the regular price of ferriage for taking him and his team across the river. The court further finds that the defendant had constantly used the boat, with its aprons attached as they were at the time of the accident to the plaintiff's horse, for four years, and that many teams had been landed from the boat daily during that time, except when the river was impassable, and that no similar accident had ever occurred before, and that for the ten years before that time he had used a boat with aprons similarly attached, from which teams had daily landed, except when the river was impassable, and that during that time no such accident had happened."

The court stated as its conclusion of law "upon the foregoing facts, that the defendant is not liable to the plaintiff for the injury sustained by the plaintiff's horse."

When one engaged in the business of a ferryman for hire, in the course of such business, receives upon his ferry-boat for transportation a traveller with horses attached to a vehicle and driven by the traveller, who retains possession and control of the horses and vehicle upon the boat, the responsibility of the ferryman in relation to such animals is not the common law responsibility of a common carrier of goods in his exclusive custody and control. In such a case the ferryman has certain duties to perform, and is liable for loss or injury occurring through his neglect to perform them, unless there be contributory fault on the part of the traveller. Among these is the duty to provide reasonably safe and convenient means for the departure from the boat of horses and vehicles transported thereon. *White v. Winnisimmet Co.*, 7 Cush. 155; *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32; S. C., 11 Am. R. 650; *Harvey v. Rose*, 26 Ark. 3; S. C., 7 Am. R. 595; *Lewis v. Smith*, 107 Mass. 334; *LeBarron v. East Boston Ferry Co.*, 11 Allen, 312; Schoul. Bailm. 433; Whart. Neg., section 706, *et seq.*

The complaint in the case at bar charged that the injury to the horse occurred through the negligence of the defend-

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ant, in keeping and maintaining his boat in an unsafe and dangerous condition, and without any fault or negligence of the plaintiff. The question of the negligence of the defendant was in issue, and the burden of showing his negligence was upon the plaintiff.

The court did not find whether or not the defendant was negligent. Among the facts stated in the finding were evidential facts relating to this question. Whether any of the facts stated did not constitute proper evidence need not be decided. Without a finding showing defendant's negligence, there could be no conclusion of law against him. .

In *Parker v. Hubble*, 75 Ind. 580, there was a special finding in which the court did not state an ultimate fact, the burden of proving which was upon the party in whose favor the conclusion of law was stated; but matter of evidence tending to prove such fact was set out in the finding. This court, in reversing the judgment for error in the conclusion of law because of the want of a finding of such fact, granted leave to move for a *venire de novo* to the appellee, thus appearing on the face of the special finding to be entitled to a finding as to such fact.

But in the case now before us the burden of proving the fact which the court did not find was upon the party excepting to the conclusion of law, and the conclusion was right upon the facts found.

The only cause assigned in the motion for a new trial, stated in different forms, was, that the finding was not sustained by sufficient evidence. All the facts stated in the finding were sustained by the evidence, though as to some of them there was conflicting testimony.

The judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the appellant's costs.

Filed June 21, 1884.

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ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—We have examined the argument on the petition for a rehearing with care, but find no reason to doubt the soundness of our conclusion expressed in the opinion heretofore filed.

It is undoubtedly the law that a common carrier is *prima facie* liable, where it is proved that the passenger took passage and was injured without fault on his part, unless the evidence proving the accident also shows that the injury was not attributable to the negligence of the carrier. *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346; *Memphis, etc., Co. v. McCool*, 83 Ind. 392; S. C., 43 Am. R. 71; *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462. But this rule does not govern this case. Here the owner took his horses on board the ferry-boat and remained in charge of them. If the ferryman had all the suitable and reasonable accommodations for safe conveyance, and used due care, he is not liable for an injury to horses taken on the boat and kept in charge of the owner. Whart. Neg., section 707, auth. n. There is in this case no finding that the boat was not reasonably safe; on the contrary, the inference is that the accident occurred not because the boat was not suitably constructed, but because one of the horses, becoming unmanageable, crowded the other horse off the boat and thrust his own leg into the opening between the boat and the apron. There is no finding that the opening was caused by the defective construction of the boat, or that it was caused by the negligent act of the appellee; for aught that appears the boat may have been properly constructed and managed with due care. *Kennedy v. Mayor*, 73 N. Y. 365, S. C., 29 Am. R. 169, is not at all in point, for there the court took the case from the jury on the ground that the unmanageability of the horse was the cause of the accident.

It is an old and well settled rule that a party who has the burden can not have a judgment, unless all the facts essential

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to a recovery are stated in the special finding or verdict. *Dixon v. Duke*, 85 Ind. 434. It is equally well settled that no inferences will be made, except inferences of law arising out of the facts. 2 Tidd Pr. 897, auth. n.

Petition overruled.

Filed Oct. 11, 1884.

No. 9057.

DOWELL v. LAHR ET AL.

NOTICE TO NON-RESIDENT DEFENDANT.—*Affidavit for Publication.—Statute Construed.*—Under the provisions of section 318, R. S. 1881, in an action against a non-resident defendant, to whom notice of the pendency of such action, and of the term at which the same will stand for trial, is to be given by publication in a newspaper, the affidavit for publication should show not merely the non-residence of the defendant, but also that, in the case wherein it is filed, a cause of action exists against such defendant, or that he is a necessary party to such action in relation to real estate.

SAME.—*Finding and Decree.—Party to Decree.—Appeal.—Collateral Attack.*—Where the affidavit for notice by publication is defective and insufficient, but the court has thereon found and decided that the non-resident defendant was duly notified by publication of the notice of the pendency of the suit, and of the term at which the same would stand for trial, such decision and decree, although erroneous, are absolutely impervious to a collateral attack by a party to the decree, whose only remedy is an appeal to the Supreme Court, within the time and in the manner prescribed by law.

From the Whitley Circuit Court.

J. S. Frazer, W. D. Frazer, T. R. Marshall, W. F. McNag-ny and C. W. Jones, for appellant.

J. S. Collins, J. W. Adair and R. S. Taylor, for appellees.

Howk, J.—On the 29th day of May, 1878, the appellant, Isaac Dowell, as sole plaintiff, commenced this suit against the appellees, John Lahr, Christian Kourt and Nicholas Mosher, as defendants. In his complaint, the appellant, Dowell, alleged, in substance, that the appellee Mosher, on the

97	146
143	484
97	146
146	135

97	146
149	394

97	146
100	420

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6th day of March, 1861, executed a mortgage conveying to the appellant two tracts of land, particularly described, in Whitley county, Indiana, to secure the payment of three promissory notes, dated March 5th, 1861, each calling for the sum of \$255.33, each and all executed by the appellee Mosher, and payable to the appellant on the first days of June, in the years 1862, 1863 and 1864, respectively. Copies of such notes and of such mortgage were filed with and made parts of the complaint. It was alleged that the notes were long since due and remained wholly unpaid; that the mortgage was duly and legally recorded in the recorder's office of Whitley county; that the notes described in the mortgage had been lost or mislaid, and the appellant could not find them although he had repeatedly made due and diligent search therefor; that the appellees Kourt and Lahr were claiming to have and hold some title to or interest in the mortgaged real estate, but that if they had any such title thereto, or interest therein, the same was subject and subsequent to the appellant's mortgage thereon. Judgment was demanded for \$2,000, for the foreclosure of the mortgage, the sale of the mortgaged premises, etc.

The appellee Mosher, who executed the notes and mortgage in suit, was notified by publication of the pendency of the action, and made default.

The other appellees, Kourt and Lahr, appeared by counsel, and answers, cross complaints, replies and demurrers were filed from time to time, until finally, on the 28th day of April, 1880, they recovered judgment against the appellant, Dowell, for their costs.

The case is before us on the pleadings. The appellees Kourt and Lahr severed in their defence. Each of them claimed to be the owner of a separate parcel of the mortgaged real estate, but both derived their respective titles in the same manner and from the same common source. Each of them filed a cross complaint, alleging therein substantially the same facts, and each demanded, *inter alia*, that his

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title to his part of the mortgaged real estate might be settled and quieted in him as against the mortgage now in suit, and that the appellant, Dowell, might be enjoined from prosecuting any suit for the foreclosure of such mortgage. The facts relied upon by the appellees Kourt and Lahr, in their respective cross complaints for the relief therein demanded, were substantially as follows:

The mortgage sued upon was executed by the appellee Mosher "to secure the payment, when they shall become due, of four promissory notes, dated March 5th, 1860, given by said Nicholas Mosher to said Isaac Dowell, to wit, one note calling for five hundred dollars, with use, due June 1st, 1861," and the other three notes described in such mortgage are the three notes sued upon by the appellant, Dowell, in this action. Before the note for \$500 became due, the payee and mortgagee, Isaac Dowell, the plaintiff in this suit, sold and assigned the same by his written endorsement to one Adam Y. Hooper, who, in like manner, sold and assigned the same to one Andrew Shorb. Afterwards, on the 19th day of April, 1862, the said note for \$500 being then due and wholly unpaid, the said Andrew Shorb, as the assignee and holder thereof, commenced suit thereon and on the mortgage now in suit, in the court of common pleas of Whitley county, against the maker of such note and mortgagor, Nicholas Mosher, and the payee and mortgagee, Isaac Dowell, the plaintiff in this action, and prayed judgment for the amount due on such note and for the foreclosure of such mortgage. A summons issued for the defendants in such suit was served on the appellant, Dowell, by reading, on the 3d day of May, 1862, by the then sheriff of Whitley county, and the defendant Nicholas Mosher was duly notified by publication of the pendency of the suit. Afterwards, at the June term, 1862, of said court of common pleas of Whitley county, the appellant, Dowell, appeared in such suit and was ruled to answer the complaint of Andrew Shorb, and on the fourth day of such term, to wit, on June 19th, 1862, having failed to answer in discharge of

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such rule, was then and there defaulted by such court for want of an answer; and the defendant Nicholas Mosher, failing to appear, was three times solemnly called but came not, and it having been found and adjudged by said court, in express terms, that said Mosher had been duly notified of the pendency of said cause, by publication, he, the said Mosher, was then and there defaulted by said court. Such suit was then and there submitted to said court of common pleas, and, after hearing the plaintiff's proofs therein, the court then and there found that there was due the plaintiff Andrew Shorb, on the note and mortgage then in suit, the sum of \$568.50, without any relief from valuation laws; and it was then and there adjudged and decreed by such court that the plaintiff Shorb have and recover from the defendant Mosher the said sum of \$568.50, that the mortgage be foreclosed and the mortgaged real estate be sold as other lands are sold on execution, without relief, etc., and that, upon such sale, the equity of redemption of the defendants Mosher and Dowell, in and to the mortgaged premises, should be forever barred and foreclosed.

On the 12th day of August, 1862, an order of sale was duly issued on such judgment, by virtue of which the sheriff of Whitley county duly advertised, offered, sold and conveyed, by deed dated November 17th, 1862, the said mortgaged real estate to the said Andrew Shorb in fee simple. This deed was duly recorded on the 22d day of November, 1862, in the recorder's office of Whitley county. Each of the appellees Lahr and Kourt claims title to his specific part of the mortgaged real estate, under the said sheriff's sale and deed to Andrew Shorb, by and through his conveyance thereof, on the 14th day of April, to the appellee Christian Kourt, for the sum of \$1,425, who took immediate possession thereof and held the same until the 4th day of February, 1870, on which latter day the said Kourt and his wife sold and conveyed sixty-five acres of such real estate, being all of it except about ten acres, to one Margaret Fullmer, and by certain conveyances afterwards made, the title to the sixty-five acres so

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conveyed to said Margaret Fullmer had become and was legally vested in the appellee John Lahr, who became and has since remained the husband of said Margaret Fullmer.

We need not state, more fully than we have, the facts relied upon by the appellees Lahr and Kourt in their respective cross complaints. If the judgment which the said Andrew Shorb, by the consideration of the court of common pleas of Whitley county, at its June term, 1862, recovered against the said Nicholas Mosher and Isaac Dowell, for the amount due on the first mortgage note of \$500, and for the foreclosure of the mortgage then and now in suit, and for the sale of the mortgaged real estate, was a legal and valid judgment, or, even if erroneous, was not absolutely void; in either event, we think that the appellees would hold such real estate freed and discharged from the lien of such mortgage, and that, as against them, it could not be foreclosed. It was alleged by the appellant, however, in his answers to the cross complaints of Lahr and Kourt respectively, that Shorb's judgment for the foreclosure of the mortgage, then and now in suit, and all the proceedings had thereunder, as stated in such cross complaints, were absolutely null and void, because, as he averred, the court of common pleas of Whitley county had no jurisdiction to make or render such judgment and decree. The only grounds upon which the want of jurisdiction by the court of common pleas was predicated, as stated in the appellant's answers, were that Nicholas Mosher, the mortgagor and one of the defendants in the Shorb suit, during its pendency, was a non-resident of this State, and had no knowledge of such suit; that no summons therein was in any manner served on the said Mosher; and that the affidavit, upon which notice of the pendency of such suit was given the said Mosher by publication, was defective, and not such as was required by the statute then in force in such a case. The affidavit referred to was set out at length in the appellant's answers, and it simply stated that Nicholas Mosher, one of the

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defendants in the Shorb suit, was not a resident of the State of Indiana.

Under the provisions of section 38 of the civil code of 1852 (2 R. S. 1876, p. 49), the affidavit for the publication of notice of the pendency of the Shorb suit, as to the defendant Nicholas Mosher, was clearly insufficient. This point was settled, and, we think, correctly so, in *Fontaine v. Houston*, 58 Ind. 316. After quoting at length section 38, *supra*, the court there said: "The plaintiff in this suit, Matilda Fontaine, was a necessary party to that suit, and she was a non-resident. Both of these latter facts should have been shown in the affidavit, to obtain an order of publication. Both were equally material, and the omission of either rendered the affidavit fatally defective. This is not a point to be argued. It is not the privilege of the court, in this class of cases, to dispense with any provision of the statute relative to the acquiring of jurisdiction; but, on the other hand, it is its duty to see that the provisions of the statute are strictly complied with. The facts required to be shown in the affidavit are jurisdictional facts, in cases where the court is expected to proceed to adjudicate upon the rights of parties who have no actual notice of the proceedings; and the courts acquire such right from the statute alone. Thus saith the statute, is the only reason necessary to be given in answer to the question, why it is necessary that the affidavit should contain the omitted statement."

But the court of common pleas of Whitley county had jurisdiction of the subject-matter of the Shorb suit; it had jurisdiction, also, of the person of the appellant, Isaac Dowell, who was a defendant in that suit, by the personal service on him of the summons issued therein; and it was the province and duty of that court to determine whether or not the defendant Nicholas Mosher had been legally notified by publication of notice of the pendency of the Shorb suit, and of the term at which the same would stand for trial, as required

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by the statute. Upon this point, the record of the Shorb suit, as pleaded by Lahr and Kourt, reads as follows: " Comes now the plaintiff and shows to the satisfaction of the court, by the proof of publication in this behalf, that said defendant, Nicholas Mosher, has been duly and legally notified of the pendency of this proceeding against him, for more than thirty days prior to the first day of the present term of this court." It will be seen from this record, that the court of common pleas, upon the proof made, judicially found and determined that the defendant Mosher had been duly and legally notified of the pendency of the Shorb suit. The court erred, we think, in its finding and decision, because, as we have seen, the publication of notice was made upon an insufficient affidavit. The error was such, no doubt, as on appeal would have required the reversal of the judgment.

Here, however, the validity of the Shorb judgment and decree is collaterally attacked, not by a stranger but by a party to the record. Isaac Dowell, the plaintiff and the appellant in the case in hand, was a party defendant in the Shorb suit, and was personally served with process therein and personally appeared to the action. He had his day in court, in such suit, but he neither objected nor excepted to the affidavit for publication, or the proof of publication, or to the judgment and decree therein. He took no appeal from such judgment and decree, and filed no complaint for the review thereof in the court where the same was rendered. Nearly sixteen years after the rendition of Shorb's judgment and decree, and nearly fourteen years after the maturity of the last of his three notes, he commenced this action for the foreclosure of the same mortgage previously foreclosed against him in the Shorb suit. In the meantime, the mortgaged real estate, sold and conveyed as it had been under the judgment and decree in the Shorb suit, changed hands by subsequent conveyances, some of it several times, the purchasers and grantees believing, no doubt, as they well might, that their

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title to such real estate was free from any claim of Isaac Dowell thereon, under the mortgage in suit.

On the hearing of the Shorb suit, the court of common pleas of Whitley county was met, *in limine*, with the question whether or not the defendant Nicholas Mosher had been duly and legally notified of the pendency of such suit. The court could not escape the decision of that question; for, as there was no appearance on the part of the defendant Mosher, the court could not proceed with the hearing of the cause, until it had first ascertained and decided that he had been legally notified of the pendency of the suit. The court did so find and decide, as we have already seen; and such finding and decision, although erroneous, can not be collaterally impeached or attacked by the appellant, Isaac Dowell. As a party to the Shorb suit, he is bound and concluded by the finding and decision of the court of common pleas, upon the question of notice to his co-defendant, Mosher. *Fowler v. Whiteman*, 2 Ohio St. 270; *Hahn v. Kelly*, 34 Cal. 391; *Reily v. Lancaster*, 39 Cal. 354; *McCauley v. Fulton*, 44 Cal. 355.

When once it is determined by a court of superior jurisdiction that the defendants in an action, of which such court has judicial cognizance, have been duly and legally notified of the pendency of the action, either by service of process or the publication of notice, however erroneous such decision may be, it is absolutely impervious to collateral attack. This doctrine has been declared and acted upon in many of the decisions of this court. Thus, in *Dequindre v. Williams*, 31 Ind. 444, it was well said by FRAZER, C. J., speaking for the court: "Now, it is not to be denied that a court of superior jurisdiction may so make a record in a case where, in fact, it has no jurisdiction, that the validity of its judgment can not be questioned collaterally. But in cases of collateral attack the legal presumption is that this will never be done." And we may add that this legal presumption can not be overborne or overcome, in case of collateral attack, by any evidence of-

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ferred by a party to the record, that the court, in fact, had no jurisdiction. The remedy of such a party, and the only remedy, where the decision is erroneous, is an appeal to this court, or, in a civil action, a complaint for review in the court where the decision was made or rendered, within the time prescribed by the statute. Among the many cases in the Indiana reports which support our conclusions in the case at bar, we cite the following: *Snelson v. State, ex rel.*, 16 Ind. 29; *Spaulding v. Baldwin*, 31 Ind. 376; *Dequindre v. Williams, supra*; *Gavin v. Graydon*, 41 Ind. 559; *Pressler v. Turner*, 57 Ind. 56; *Helphenstine v. Vincennes Nat'l Bank*, 65 Ind. 582 (32 Am. R. 86); *Faris v. Reynolds*, 70 Ind. 359; *Board, etc., v. Hall*, 70 Ind. 469; *Hume v. Conduitt*, 76 Ind. 598; *McAlpine v. Sweetser*, 76 Ind. 78; *Stout v. Woods*, 79 Ind. 108; *Krug v. Davis*, 85 Ind. 309; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471.

Our conclusion is that the judgment and decree of the court of common pleas of Whitley county, in the Shorb suit, although erroneous, was not absolutely void, and could not, therefore, be successfully attacked or impeached collaterally by the appellant, Isaac Dowell, who was a party to such judgment and decree; and that, as against the appellees Lahr and Kourt, who have regularly derived title to the mortgaged real estate under such judgment and decree, the appellant, Dowell, is not entitled now to the foreclosure of the mortgage, foreclosed against him in Shorb's action and now in suit. This is the only question for decision in the case in hand, although it is presented in several different forms.

We find no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Sept. 17, 1884.

Bowman v. Mitchell.

No. 11,365.

BOWMAN v. MITCHELL.

97	155
141	156

97	155
152	315

MORTGAGE.—*Foreclosure.*—*Notes for Purchase-Money.*—*Alteration.*—*Consent of Husband.*—*Defence by Wife.*—*Answer.*—*Reply.*—In a suit to foreclose a mortgage given to secure notes for the purchase-money of the mortgaged property, the wife of the mortgagor, who had joined in the mortgage, answered that after the execution of the mortgage, the payee of the notes unlawfully, and without her knowledge, fraudulently altered the notes executed by her husband, by inserting a provision that the notes were to bear ten per cent. interest from maturity. To this the plaintiff replied that the alteration was made in the presence, and by the direction and agreement, of the maker.

Held, that as the answer was pleaded as a defence to the entire debt secured by the mortgage, and as the wife owned no interest in the real estate, inchoate or otherwise, as against the mortgagee, the debt being for purchase-money of the property, the reply was sufficient.

From the Henry Circuit Court.

D. W. Chambers and *J. S. Hedges*, for appellant.

J. H. Mellett and *E. H. Bundy*, for appellee.

COLERICK, C.—This action was instituted by the appellee against the appellant, and Edmund R. Bowman, her husband, to foreclose a mortgage executed by them upon certain real estate, in Henry county, Indiana, and given to secure the payment of the purchase-money therefor, which was evidenced by certain notes executed by Edmund R. Bowman alone. The appellant filed a separate answer to the complaint, averring that after the execution of the mortgage, the payee of the notes “unlawfully, and without the knowledge of this defendant, fraudulently altered and changed the notes,” by inserting therein provisions that the same were to bear ten per cent. interest from maturity. To this answer a reply was filed, in the second paragraph of which it was averred “that the alteration of the notes sued upon, mentioned in defendant’s answer, was made, and the words inserted, in the presence and by the direction of and agreement with said Edmund R. Bowman, the maker of the notes.” To this

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paragraph of the reply a demurrer was overruled. The issues were tried by the court, and, at the request of the appellant, the court made a special finding of the facts, and stated its conclusions of law thereon, to which conclusions the appellant excepted, and thereupon judgment was rendered in favor of the appellee. The errors assigned are the rulings of the court in overruling the demurrer to the second paragraph of the reply, and in overruling the exceptions to the conclusions of law upon the facts found.

This case has been here before. See *Bowman v. Mitchell*, 79 Ind. 84. The sole question then presented merely involved the sufficiency of the answer of the appellant, the substance of which is above set forth, to which a demurrer had been sustained. It was held by this court that the answer was sufficient, and for the error of the court below in sustaining the demurrer thereto the judgment was reversed. It was then said by this court: "The foregoing authorities show that the alteration of the notes alleged in the separate answer of the appellant Mary Bowman, avoided the notes and made the mortgage unavailable as against her husband, Edward Bowman, and therefore unavailable against his wife," and the cause was remanded, with instructions to the court below to overrule the demurrer to the answer, and for further proceedings as to the appellant. In accordance with the instructions so given, the demurrer was overruled, and the reply above set forth was filed. The question now presented is, was the reply sufficient to avoid the answer? It averred, as above stated, that the notes, for which the mortgage was given as security, were altered "in the presence and by the direction of, and agreement with, Edmund R. Bowman, the maker of said notes." By this averment, the truth of which was admitted by the demurrer, it clearly appears that the validity of the notes, which were executed by Edmund R. Bowman alone, was not destroyed or impaired by their alteration, as the alteration was made with his consent, and, therefore, it follows that the mortgage

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which was given to secure their payment was available against him. Assuming, in the absence of an averment in the reply to the contrary, that the notes were altered without the knowledge or consent of the appellant, as alleged in her answer, the inquiry arises how was she affected thereby? The mortgage, as shown by its recitals and the averments in the complaint, was given to secure the payment of the purchase-money for the real estate mortgaged, and hence it was not essential to its validity, as against the appellant, that she, as the wife of Edmund R. Bowman, should have joined with him in its execution. The mortgage, whether executed by her or not, was equally valid as a lien upon the entire real estate, as she owned no interest therein, inchoate or otherwise, as against the mortgagee. R. S. 1881, section 2495; *Kissel v. Eaton*, 64 Ind. 248; *Baker v. McCune*, 82 Ind. 339; *Baker v. McCune*, 82 Ind. 585. The demurrer to the reply was properly overruled.

The facts set forth in the appellant's answer were pleaded as a defence to the entire debt secured by the mortgage. If they had been pleaded as a defence by her only to the additional indebtedness created by the alteration of the notes without her consent, a different question from the one now decided would have been presented for our consideration.

The exception to the conclusions of law stated by the court below upon the facts found presents the same question above decided, and, therefore, in view of the conclusion reached and expressed by us, we must hold that no error was committed in overruling the same.

There being no error in the record, the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Sept. 20, 1884.

Melton *et al.* v. Gibson.

No. 11,524.

MELTON ET AL. v. GIBSON.

PROMISSORY NOTE.—*Payable to Order or Bearer.*—*Commercial Paper.*—*Statute Construed.*—A promissory note payable to a designated person or bearer, or payable to bearer, is a valid promissory note, and when payable at a bank in this State is, under our statute, protected as commercial paper in the hands of a *bona fide* holder.

SAME.—*Definition.*—The statute does not define what is a valid promissory note, but accepts the instruments so defined by the common law.

SAME.—*Payable at Bank.*—*Bearer.*—A promissory note, valid at common law, is so under our statute, but is not negotiable under the law merchant unless payable at a bank in this State. That it is transferable by delivery does not affect its negotiability under the statute.

SAME.—*Indorsement.*—*Delivery.*—Section 5501, R. S. 1881, authorizes the assignment of all classes of choses in action by endorsement, but does not require an endorsement where the instrument in terms authorizes a transfer by delivery.

From the Kosciusko Circuit Court.

L. H. Haymond and *L. W. Royse*, for appellants.

J. D. Widaman and *J. W. Cook*, for appellee.

ELLIOTT, C. J.—The note upon which this action is founded is payable at a bank in this State, and to the “Jacksonville Sulkey Plow Works or bearer.” By our statute, promissory notes payable at a bank in this State are negotiable under the law merchant, and by that law all promissory notes in the hands of a holder for value, without notice, and where title was acquired before maturity, are protected against the defences of want or failure of consideration.

The contention of the appellant is, that as the note is payable to bearer, and not to order, it is not protected by the law merchant. This contention can not prevail. A promissory note payable to a designated person or bearer, or payable to bearer, is a valid promissory note, and as such is, when payable at a bank in this State, protected as commercial paper in the hands of a *bona fide* holder. Story says: “So, a note payable to A or bearer, or payable to bearer, is a valid

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promissory note." Story Prom. Notes, section 36. A note payable to bearer is, in legal contemplation, payable to the person who becomes the lawful holder. 1 Daniel Neg. Inst., section 99. It is, however, argued that promissory notes are negotiable by virtue of our statute, and that we can not look outside of our own State for authority. It is true that our statute does establish peculiar rules upon this subject. *Bullitt v. Scribner*, 1 Blackf. 14; *Holloway v. Porter*, 46 Ind. 62. But, while this is true, it is also true that promissory notes payable in bank are made negotiable as inland bills of exchange, and such instruments, as is well known, are protected in the hands of *bona fide* holders. Our statute does not determine what a valid promissory note is, but accepts as the correct description of such an instrument that given by the common law authorities. The statute does not profess to define what shall be the form or effect of a promissory note, but provides that when such an instrument is payable at a bank in this State, it shall have the same protection as that given to inland bills of exchange. The effect of this provision is not to give the character of a promissory note to an instrument, but to require that in order that the note shall possess the requisite of negotiability under the law merchant, it must be payable at a bank in this State.

A promissory note valid at common law is so under our statute; it is not, however, negotiable under the law merchant unless payable at a bank in Indiana. When the instrument is valid in form and effect as a promissory note, and is payable as the statute prescribes, it possesses substantially the same elements of negotiability as an inland bill of exchange. The statute is so plain that we can see no room for fair debate; thus it reads: "Notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange." Both kinds of notes, those payable to order and those payable to bearer, are here given explicit recognition. Our decisions recognize the doctrine that notes payable at a bank are protected as inland bills of exchange, although pay-

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able to bearer and transferred by delivery. *Hall v. Allen*, 37 Ind. 541; *Riley v. Schawacker*, 50 Ind. 592.

The section of the statute which provides that all instruments for the payment of money shall be negotiable by endorsement applies to such instruments as require an endorsement to pass the legal title, and was not intended to apply to cases where the full legal title passes by delivery. R. S. 1881, section 5501. The main purpose of this provision was to authorize the assignments of all kinds of choses in action, and not to make it necessary to transfer by writing where the instrument itself, and by force of its own terms, vested the entire legal title by delivery. The statute does not require an endorsement or written assignment in cases where the title will pass without it. The intention of the law-makers was to increase, not diminish, the right of transfer of choses in action, and they did not intend to require a written transfer in cases where the contract of the parties provided for payment to the bearer, and where, by the common law, delivery placed the whole title in the person receiving the instrument.

Judgment affirmed.

Filed Sept. 20, 1884.

No. 11,084.

WISHMIER v. THE STATE, FOR THE USE OF DICKEY, COMMISSIONER OF DRAINAGE.

DRAINAGE.—*Expense.*—*Benefit.*—*Constitutional Law.*—The Legislature has constitutional power to authorize and provide for the drainage of wet and overflowed lands at the expense of those whose real estate is benefited by such work.

SAME.—*Title of Act.*—*Collecting Assessments.*—*Attorney's Fees.*—The title of the act of April 8th, 1881 (Acts 1881, p. 397), "An act concerning drainage," is sufficient, under section 19 art. 4 of the Constitution, to include legislation directing the mode of making and collecting assessments upon lands benefited by the work, including the collection of reasonable attorney's fees.

SAME.—*Complaint.*—*Substantial Compliance.*—A complaint to collect an as-

97	160
145	141
145	574
97	160
157	327
97	160
161	489

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assessment under such act must state facts showing that assessments were in fact made upon the defendant's land; that they were confirmed by the judgment of the court, and that the defendant was a party to the proceedings. It should show a substantial compliance with the various provisions of the statute. This is required notwithstanding the provisions of section 8 of the act.

From the Hamilton Circuit Court.

W. Henderson and *J. W. Robinson*, for appellant.

D. Moss, R. R. Stephenson, R. B. Beauchamp, G. W. Gifford and *J. Mettlin*, for appellee.

HAMMOND, J.—This action, commenced in the Tipton Circuit Court, reached the court below by changes of venue. It was a suit by the appellee against the appellant to enforce the lien, with attorney fees, of an assessment for drainage. The complaint was held good upon demurrer. Issues were joined and tried by the court and a finding and judgment rendered for the appellee. Appellant moved for a new trial, but his motion was overruled.

The proceedings to establish the ditch were had, and the present action was brought, under the act of April 8th, 1881 (Acts 1881, p. 397), prior to the amendments of 1883. Sections 4273 to 4284, R. S. 1881. Section 4277 provides, among other things, that the commissioner of drainage, charged with the execution of the work, "may, if he so determine, bring suit in the name of the State of Indiana, for his use as commissioner of drainage, in any court of competent jurisdiction, to enforce a lien upon any tract or tracts of land for the amount so assessed by him; and all judgments obtained in such cases may include reasonable attorney's fees for services in prosecuting the same, and shall be without relief from valuation or appraisement laws." The assessments here spoken of are those made by the commissioner charged with the execution of the work upon assessments of benefits to lands previously made by the commissioners of drainage, as confirmed by the court.

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It is claimed by appellant that the act of the Legislature in question is void as being repugnant to the Constitution. It will be observed that the statute only authorizes the drainage of lands by assessments upon lands benefited by the work, where the public health will be improved, public highways benefited, or where the work is of public utility. Sections 4274-5, R. S. 1881. The power of the Legislature, in such cases, to authorize and provide for the drainage of wet and overflowed lands at the expense of those whose real estate is benefited by such work, has been fully recognized by this court. *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Chambers v. Kyle*, 67 Ind. 206; *Desner v. Simpson*, 72 Ind. 435.

The title of the act of April 8th, 1881, *supra*, is "An act concerning drainage." Appellant's counsel urge that the title is not sufficient to cover various provisions of the act, such as those for the appointment of commissioners of drainage, prescribing the mode of collecting assessments and authorizing judgments in such collection to include attorney's fees for prosecuting actions to enforce liens. Section 19, art. 4, of the Constitution of the State provides that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." It is only the *subject* of an act that must be expressed in the title. Matters properly connected with such subject are not required to be thus expressed. *Thomasson v. State*, 15 Ind. 449; *Robinson v. Skipworth*, 23 Ind. 311; *Hingle v. State*, 24 Ind. 28; *Murray v. Kelly*, 27 Ind. 42.

In the act under consideration, its subject is briefly but fully expressed in the title. The appointment of commissioners of drainage and the mode of making and collecting assessments upon lands benefited by the work are matters properly connected with the subject of the act. We perceive no valid constitutional objections to the enactment of any of its provisions.

We think, however, that appellant's demurrer should have

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been sustained to the complaint. Its averments as to the proceedings had to establish the ditch are for the most part not only indirect but exceedingly vague. There is no averment that the appellant's name or the description of his lands was contained in the petition for the construction of the ditch. Notice is not alleged to have been given of the intention to present the petition, and it can only be gathered, inferentially, from the complaint, that assessments were made by the commissioners of drainage upon the appellant's lands, or that such assessments were confirmed by the court. It is true that section 8 of the act (section 4280, R. S. 1881) provides that "collections of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessment of benefits and injuries," and that "such judgment shall be conclusive that all prior proceedings were regular and according to law." At the same time, however, a complaint for the collection of assessments must state facts showing that assessments were in fact made upon the defendant's land; that they were confirmed by the judgment of the court; and that the defendant was a party to the proceedings. A complaint in a case like the present should aver facts showing a substantial compliance with the various provisions of the statute. *Shaw v. State, ante*, p. 23.

Reversed with costs, with direction to the court below to sustain appellant's demurrer to the complaint and for further proceedings.

Filed Sept. 20, 1884.

No. 11,251.

LANMAN ET AL. v. CROOKER.

DEED.—*Mortgage.—Description.—Evidence.—Real Estate, Action to Recover.—*

A. executed a mortgage to B. upon a certain parcel of land therein described as "The west half of the northeast quarter of section nineteen, township thirty-seven north, of range five east, except twenty acres from

97	163
126	279
97	163
151	87

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the northeast corner of said above described tract of land, formerly deeded to Wm. Davis and Emeline Ann Davis," in Elkhart county, and, upon a decree of foreclosure, purchased the same and took possession of the north sixty acres of the west half of said quarter section. Afterwards twenty acres out of the northeast corner of said tract was, by successive deeds, conveyed from A. to C., and in an action by him against B. to recover possession of said twenty acres, the mortgage made by A. to B., a deed from A. to Amelia Davis for twenty acres off the south end of the west half of said quarter section, and parol testimony to show that no other portion of said land had been conveyed, were admissible in evidence for the purpose of showing that the twenty acres excepted from said mortgage was not in the northeast corner of said land, but was off the south end.

From the Elkhart Circuit Court.

G. W. Best and *J. M. Vanfleet*, for appellants.

H. D. Wilson and *W. J. Davis*, for appellee.

BEST, C.—The appellee brought this action to recover twenty acres of land, in a square form, out of the northeast corner of the west half of the southeast quarter of section nineteen, township thirty-seven north, of range five east, Elkhart county.

The cause was tried by a jury, a verdict returned for the appellee, and judgment rendered accordingly. A motion for a new trial, on the ground that the court erred in excluding the appellant's evidence, and in charging the jury to find for the appellee, was overruled, and this ruling is assigned as error.

Both parties claim the land in dispute through Harriet Schutt, who, on and before August 1st, 1866, owned the entire west half of said quarter section.

The appellee claims through a deed made by her and her husband to John Squires on the 6th day of December, 1873.

The appellants claim through a mortgage made by her and her husband on the 1st day of July, 1868, upon the entire west half of said quarter except twenty acres.

The dispute is whether the land excepted from the mortgage is the land sought to be recovered. If it is the appellee is entitled to recover, and if it isn't the appellants are en-

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titled to recover. This question depends upon the proper construction of the description contained in the mortgage.

The appellee read in evidence the deed from Harriet Schutt and husband to John Squires, and several deeds constituting a regular chain of title from Squires to him. This made for him, as is conceded, a *prima facie* case.

The appellants then offered to read in evidence the mortgage from Harriet Schutt and husband for the west half of said land except twenty acres thus described: "The west half of the southeast quarter of section nineteen, in township thirty-seven north, range five east, except twenty acres from the northeast corner of said above described tract of land, formerly deeded to Wm. Davis and Emeline Ann Davis."

It was agreed that this mortgage had been duly foreclosed, the land sold upon the decree to the mortgagee, and a sheriff's deed executed by him to one of the appellants, all by such description.

The appellants also offered to read in evidence a deed from Harriet Schutt and husband to Amelia Davis, dated August 29th, 1866, for twenty acres of land off the south end of the west half of said quarter section.

They also offered parol testimony to show that when said deed was made Amelia Davis was the wife of William Davis, and that no part of said land had ever been deeded to Wm. Davis and Emeline Ann Davis.

All this evidence was excluded, and the jury was instructed to return a verdict for the appellee.

Did this evidence tend to establish a defence? If it tended to show that the "twenty acres" excepted from the mortgage is not the twenty acres in dispute, then this land was included in the mortgage, and the title is not in the appellee.

The mortgage embraced the entire west half of the quarter section except twenty acres. These are described as "twenty acres from the northeast corner, * * formerly deeded to Wm. Davis and Emeline Ann Davis." This description contains two calls—one as land in the "northeast corner," and the

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other as land "formerly deeded to Wm. Davis and Emeline Ann Davis." If this land was never deeded, as stated, then both calls are not correct descriptions, one or the other is false, and if one is true and the other false, the false must be rejected and the description read as though it did not contain the false call. *Worthington v. Hyler*, 4 Mass. 196; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66; *Piper v. True*, 36 Cal. 606.

The first call can not be said to be false unless the second is true and is different from the first. The falsity of the first is not shown by the language of the description itself, but this may be shown by evidence *aliunde*. *Harris v. Doe*, 4 Blackf. 369; *Symmes v. Brown*, 13 Ind. 318.

This rule applies to property described in a sheriff's deed. *Abbott v. Abbott*, 51 Me. 575; *Lodge v. Barnett*, 46 Pa. St. 477.

It also applies to the description of property acquired through a judicial sale. *Hedge v. Sims*, 29 Ind. 574; *Allen v. Shannon*, 74 Ind. 164; *Rucker v. Steelman*, 73 Ind. 396; *Willson v. Brown*, 82 Ind. 471.

This rule does not apply where a misdescription runs through such proceedings as in *Rogers v. Abbott*, 37 Ind. 138, *Miller v. Kolb*, 47 Ind. 220, and *Angle v. Speer*, 66 Ind. 488, but does apply where the description is merely ambiguous, and hence applies in this case.

The deed offered in evidence showed that twenty acres of this land had formerly been deeded to Amelia Davis. This conveyance corresponds with the description except the names. In this respect there is a variance, but this variance does not, as we think, vitiate the description and render it inapplicable to this land. Without the names the description shows that twenty acres of the land had been formerly deeded, and this conveyance satisfies the description, in the absence of proof that some other conveyance had been made to these persons.

In *Getchell v. Whittemore*, 72 Maine, 393, a similar question arose. The defendant executed a mortgage upon certain real estate, except a lot which was described as having been conveyed to him by Roswell Hitchcock. Roswell Hitchcock had

not conveyed the lot to him, but Urban L. Hitchcock had, and it was held that though the name was different, this fact did not vitiate the description, and that the same applied to the lot actually conveyed.

In *Abbott v. Abbott, supra*, the land conveyed was described "as surveyed by Israel Johnson and Isaac Boynton." They had not surveyed the land, but one Harvey had, and the court held that though the names were different, it was a question of fact whether the Harvey line was not intended.

No greater variance exists in this case than in the above cases. After dropping the names an equally sufficient description remains, and this description applies to the land embraced in the conveyance.

Whether it was so intended depends upon the proper construction of the description in the light of the attending circumstances. These may be shown, as has been said, by extrinsic evidence; it may be shown that the twenty acres formerly deeded was off the south end, and not out of the northeast corner. "Thus, if the premises are bounded by land of A. on the *north*, and A.'s land is on the *south*, it may be proved that it was intended as the *southern* boundary. *White v. Eagan*, 2 Bay, (S. C.) 247. So, if bounded on 'Broad River,' it may be proved that 'Catawba River' was intended. *Middleton v. Perry*, 2 Bay, 539." *Abbott v. Abbott, supra*.

The evidence excluded tends to show that no other land was "formerly deeded," and hence tends to show that the excepted land was not in the northeast corner.

If no other land was deeded, we have two conflicting descriptions, one describing twenty acres in the northeast corner, and the other twenty acres off the south end. One or the other must be rejected, as obviously both were not intended. The rule in such cases is to apply the description to the land actually owned, and to adopt such construction as best comports with the manifest intention of the parties and the circumstances of the case. *Drew v. Drew*, 8 Foster, 487; *Piper v. True, supra*; *Bell v. Sawyer*, 32 N. H. 72.

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Applying this rule, in the light of the facts, the excluded evidence tended to prove, we think it manifest, that these parties intended to except twenty acres off the south end. The mortgage embraced the entire west half except twenty acres; the mortgagors owned the entire west half except twenty acres; they excepted twenty acres formerly deeded; the twenty acres formerly deeded were off the south end, and it is, therefore, apparent that they intended to except such twenty acres. This conclusion is also strengthened by the presumption that they intended to mortgage their own land, and not the land of another.

As the evidence excluded tended to show that the second call was true and the first false, the first may be rejected without impairing the description. *Worthington v. Hyler, supra*; *Ousby v. Jones*, 73 N. Y. 621.

The fact that the twenty acres in the northeast corner had not been "formerly deeded" created a latent ambiguity, and as the evidence offered tended to remove it, the court erred in excluding it.

The judgment should, therefore, be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be reversed, at the appellee's costs, with instructions to grant a new trial.

Filed March 12, 1884.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—We have for the second time carefully investigated the questions in this case, and have found no reason to change our former opinion.

The question is whether the excluded evidence was competent; its weight and effect were matters for the jury. The evidence did tend to defeat the appellee's claim of title, and was competent. *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205); *Harbor v. Morgan*, 4 Ind. 158.

We do not think that there was any attempt to correct a description against a subsequent purchaser, for there are two

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calls in the mortgage, the one correct, the other incorrect, and all that is done by the former opinion is to declare that in such a case it is proper to reject the incorrect and accept the correct description. The instrument of title was of record, and gave notice of the two descriptions, and thus put a purchaser upon inquiry as to the true one. It is not the case of an entirely erroneous description.

The evidence offered should have been admitted, and this is the only point here involved.

Petition overruled.

Filed Oct. 11, 1884.

No. 11,420.

WHITEHILL ET AL. v. FAUBER.

INJUNCTION.—Execution.—Judgment.—Purchase of Land.—Demurrer.—Where a complaint to enjoin the sale of land on an execution alleged, not only that the plaintiff in the execution had receipted the same, but that the judgment had been actually paid in full and returned satisfied nearly three years before the complainant bought the land and took possession of it and paid for it, and that at the date of such purchase there was no judgment lien or other incumbrance on the property, a demurrer for want of sufficient facts should be overruled.

SAME.—Evidence.—Complaint.—Parol Contract.—In such case, an exception to parol evidence in reference to a parol contract for the purchase of the land, offered on the trial of the issues formed under such complaint, is not well taken, which states as a reason for excluding the evidence that “the complaint is based upon a written contract, and contains no allegations sufficient to authorize proof of a parol contract.”

From the Warren Circuit Court.

J. G. Pearson, for appellants.

T. F. Davidson and — *Durborow*, for appellee.

BICKNELL, C. C.—The appellee filed his complaint against the appellants to enjoin the sale of the plaintiff's land on an execution in favor of the appellant Whitehill against Taylor White. The appellant Stump was the sheriff who held the

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execution. A demurrer to the second paragraph of the complaint was overruled.

The defendants answered jointly by a general denial, and Whitehill answered separately in two paragraphs, to which there is no reply in the record; they are treated as denied.

The court found for the plaintiff and awarded a perpetual injunction. The defendant's motion for a new trial was overruled and they appealed.

They have assigned as errors:

1. Overruling the demurrer to the second paragraph of the complaint.

2. Overruling the motion for a new trial.

As the second paragraph of the complaint alleges not only that Whitehill's execution was receipted in full by him, but that it was actually paid in full, and returned satisfied nearly three years before the appellee bought the land in controversy, and took possession of it and paid for it, and that at the time of such purchase there was no judgment lien or other encumbrance upon the property, and as these allegations are admitted by the demurrer, there was no error in overruling it.

There was evidence tending to show that one Stinespring had a judgment in attachment against White, requiring the sale of twelve and two-thirds acres off of the west side of the southwest quarter of the southeast quarter of section 28, township 21, range 9 west, but that the sheriff, in his advertisement of sale, omitted the words "of the west side" and described the land as twelve and two-thirds acres off of the southwest quarter of the southeast quarter of said section, town and range, and his return stated a sale of the land, as above described, to said Stinespring, on November 23d, 1878, for \$116.06, which was enough to pay the debt and costs, and Stinespring receipted in full of the execution.

It appeared that the appellant Whitehill, in March, 1879, obtained a judgment against said White, and then as judgment creditor redeemed from Stinespring's sale, and issued

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an execution on his own judgment, under which there was a sheriff's sale of said redeemed property to said Whitehill, on January 3d, 1880, and that he, on January 31st, 1880, receipted in full of his said judgment, and that on June 22d, 1880, said last mentioned execution was returned satisfied in full. In all of these proceedings of Whitehill, the land was described as twelve and two-thirds acres off of the southwest quarter of the southeast quarter of the section, town and range aforesaid. No further proceedings were shown until September 25th, 1882, nearly three years after Whitehill had executed his receipt in full, and more than two years after his execution had been returned satisfied.

There was evidence tending to show that the southwest one-fourth of the southeast one-fourth of section twenty-eight aforesaid, had been divided into three parts, of twelve and two-thirds acres each, one on the west side, one on the east side, and one in the middle, divided by parallel lines running north and south across the entire tract, and that the twelve and two-thirds acres off of the west side was the land ordered to be sold under Stinespring's attachment, which, however, was not properly sold, because in the advertisement of the sale the words "of the west side" were omitted.

It appeared that the appellee, Fauber, employed an attorney to examine the records, who reported that there was no judgment lien on the land in controversy, which is the said middle twelve and two-thirds acres; and that on September 25th, 1882, Fauber bought from said White said middle twelve and two-third acres, and that after said purchase Whitehill filed his complaint against White alone, in which he stated the aforesaid misdescription, and demanded relief against White, and on November 11th, 1883, obtained a decree that the satisfaction of his said judgment be set aside, and that said judgment be restored to full power, and that he be subrogated to all the rights of said Stinespring in and to the judgment obtained by the latter against said White.

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After these proceedings Whitehill issued the execution complained of in the present suit, and had it levied by his co-appellant Stump upon the middle twelve and two-thirds acres purchased by the appellee as aforesaid.

The appellee testified as follows: "I am in possession of the land in controversy; I bought it from Taylor White on the 25th of September, 1882, and took possession of it and paid him for it; the contract was not reduced to writing except that he gave me a deed for it."

The reasons for a new trial are:

1. That the finding was not sustained by sufficient evidence.
2. That the finding was contrary to law.
3. That the appellee was permitted to testify as above stated.

The objection to this testimony, as stated in the bill of exceptions, is, that "the complaint is based upon a written contract, and contains no allegations sufficient to authorize proof of a parol contract."

This objection can not be sustained. The complaint is based upon the appellee's purchase and payment for and possession taken of the land levied upon, at a time when the records showed no lien upon it in favor of Whitehill.

The defence that the appellee had notice that Whitehill's judgment was in fact unsatisfied was not sustained by the evidence.

There was evidence tending to support the finding, and it was not contrary to law.

The judgment ought to be affirmed. This result renders it unnecessary to examine the cross errors.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Sept. 20, 1884.

Judd *et al.* v. Martin.

No. 10,754.

JUDD ET AL. v. MARTIN.

97	173
150	518

PROMISSORY NOTE.—*Want of Consideration.*—*Surrender of Cause of Action.*—*Extension of Time.*—*Chattel Mortgage.*—*Execution of New Notes Payable in Bank.*—*Agreement.*—Where A. executed three promissory notes not negotiable by the law merchant to B., without consideration, and B. endorsed them to C. for value, and when the notes became due, upon B. undertaking to execute, and subsequently executing, a chattel mortgage to secure A., he became a joint maker with B. of three promissory notes for a like sum as the original notes, the new notes being payable to C. at a bank in this State at a future time;

Held, that admitting that A. might have defended successfully a suit by C. upon the three original notes, for want of consideration, as provided by section 5503, R. S. 1881, yet, as C. had a good cause of action against B. upon his endorsement, the loss of this right, and the surrender of the notes, constituted a sufficient consideration for the execution by A. of the new notes as surety for B.

Held, also, that the granting of the extension of time to B. for a definite period was a sufficient consideration for the execution by A. of the new notes as surety for and with B.

Held, also, that the execution of the chattel mortgage, in pursuance of the agreement therefor, if A. would sign, furnished a sufficient consideration moving to A. for his execution of the notes as surety.

INSTRUCTIONS.—*Legal Principles Applicable.*—*Conclusions Drawn from Facts.*—Where an instruction contains a correct statement of legal principles applicable to the evidence, the finding will not be disturbed, because the instruction does not apply legal principles, by stating the conclusions which should be drawn by the jury from concrete facts developed by the evidence, no such instruction having been asked.

From the Whitley Circuit Court.

W. Olds, for appellant.

W. F. McNaghy and *T. R. Marshall*, for appellees.

BLACK, C.—The appellee sued the appellants, Judd and Williams, upon their three joint promissory notes payable in a bank in this State to the order of the appellee. Williams was defaulted. Judd answered in three paragraphs: *First. Non est factum*, under oath. *Second.* The general denial. *Third.* Want of consideration. To the third paragraph the plaintiff replied by a general denial. There was a trial by jury and

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the verdict was in favor of the plaintiff. Judd moved for a new trial, assigning as causes, first, that the verdict was not sustained by sufficient evidence and was contrary to law; second, that the court erred in giving instruction numbered five to the jury. The motion was overruled, and judgment was rendered on the verdict. Judd alone assigns as error the overruling of his motion for a new trial.

It is contended that upon the evidence the jury should have found for the defendant Judd upon the third paragraph of his answer. The evidence showed that at different times Judd had executed to Williams a number of promissory notes not payable in bank, and therefore not governed by the law merchant; that Williams had, for valuable considerations, endorsed these notes to the appellee, who held them until they all became due, when he placed them in a bank for collection or renewal. Judd and Williams together went to this bank, and the amount of said notes so placed there having been computed by a bank official, and three notes payable to the order of appellee, aggregating that amount and due respectively in six, nine and twelve months from that time, having been prepared by said official, they were then signed by Judd and Williams as joint makers, Williams agreeing with Judd to make him a chattel mortgage to indemnify him for signing these notes, which were the notes sued on in this action. The other notes were thereupon surrendered by said bank to Judd. On the same day, at a lawyer's office, Williams executed to Judd such a mortgage.

It is contended that it was shown that said notes executed by Judd to Williams and assigned by endorsement to the appellee were, as between Judd and Williams, without consideration. We will assume this to be true, and that, as claimed by counsel, if Judd had been sued on said notes by said assignee, the former might have availed himself of want of consideration as between him and Williams as a defence, as provided by statute, R. S. 1881, section 5503. Yet it does not

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follow that the notes in suit were without consideration as against Judd.

The appellee had a good cause of action against Williams as assignor of the notes surrendered. The loss of this right against Williams, which resulted from the acceptance of the new notes and the surrender of the old ones, was a sufficient consideration for the execution of the new notes by Judd. *Justice v. Charles*, 7 Blackf. 121; *Williams v. Rank*, 1 Ind. 230.

The granting of the extension of time for definite periods by Martin to Williams was a sufficient consideration for the execution of the new notes by Williams, and by Judd as his surety, in which capacity Judd appears to have executed the new notes. *Coffin v. Trustees, etc.*, 92 Ind. 337. Furthermore, the execution of the chattel mortgage, in pursuance of an agreement to execute it if Judd would sign, furnished a sufficient consideration moving to him for his execution of the notes as surety.

The portion of the fifth instruction to which objection is made is as follows: "A sufficient consideration may arise, *first*, by reason of a benefit resulting to the party promising to pay, or to a third person by the act of the promisee, or person to whom the promise is made. *Second*, by reason of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation, or parting with anything of value, upon the faith of the promise, with the knowledge and procurement of the person making the promise."

This is not liable to objection as an incorrect statement of legal principle, and the appellant does not object to it on such ground, but he contends that it was not applicable to the case. We think that the principle stated was applicable to the evidence. The instruction is, perhaps, deserving of criticism, as being an abstract statement. A charge which applies legal principles, by stating the conclusions which should be drawn by the jury from concrete facts developed by the evidence, will generally afford much greater aid to men unskilled in the

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law. But any proper instruction may be obtained by a party upon request, and a judgment will not be reversed except for injurious error, which we do not find in this record.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the costs of the appellants.

Filed Sept. 18, 1884.

97 176
167 631

No. 11,624.

MOON v. THE BOARD OF COMMISSIONERS OF HOWARD COUNTY.

COUNTY COMMISSIONERS.—*Claim for Services.*—*Contract.*—One claiming for services rendered to a county must show a contract under due authority of law made with the proper officer, or else a statutory provision for such services.

SAME.—*Authority to Contract.*—*Agents.*—The general, though not unlimited, authority to contract for a county, is vested in the board of commissioners under the statute, but other agents are named in certain cases.

DRAINAGE.—*Viewers.*—*Appointment of Surveyor.*—*Services.*—*Compensation.*—*Statute Construed.*—If the viewers appointed under the drainage act, section 4286, R. S. 1881, have authority to employ a surveyor, such employment is limited to the terms and purposes specified in the act. As their authority is not general, and it is at the utmost limited to the appointment, and does not authorize them to indicate the work nor fix the compensation, the statute fixes both. It does not authorize the surveyor to examine the records or prepare report of viewers.

SAME.—*Petitioners.*—*Land-Owners.*—Section 4274, R. S. 1881, requires the petitioners for the establishment of a ditch to obtain the names of land-owners.

PRACTICE.—*Evidence.*—*New Trial.*—A finding on the evidence can only be reviewed where there is a motion for a new trial.

SAME.—*Costs.*—*Appeal from Commissioners.*—*Judgment.*—*Presumption.*—Where the record does not show that the judgment on appeal was a different judgment from that given by the board of county commissioners, no error in taxing appellant with the costs appears. Presumptions in favor of the trial court must be overcome.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge, M. Bell and W. C. Purdum, for appellant.

M. Garrigus, for appellee.

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ELLIOTT, C. J.—The appellant claims that the appellee is indebted to him for services rendered as a surveyor in proceedings to establish a ditch, and in his complaint sets forth several items; some of these were allowed, and others, on motion, were struck from the complaint. The rejected items were for services in examining the record to ascertain the names of owners of lands adjacent to the proposed ditch, and for services in preparing reports of the viewers.

A claim against a county for services can exist only where there is a contract, or where there is a statute providing for them and directing compensation. No person can voluntarily perform services for a county and demand compensation except in cases provided for by statute, and one who demands compensation for services rendered to a county must show a contract made under due authority of law with the proper officers, or else show a statute making provision for such services. The right to a recovery is not made out by showing the beneficial character of the services, but the claimant must also show either a contract or a statute making provision for such services. It must also be made to appear in cases where a contract is relied on, that the contract was within the scope of the authority of the officers or agents who assumed to make it.

The general authority to contract on behalf of the county is vested in the board of commissioners, and that body possesses extensive, but by no means unlimited, powers. *Nixon v. State, ex rel.*, 96 Ind. 111. The authority of the board is that conferred by statute, and it is, as a general rule, the authorized representative of the county in the matter of making contracts for services, although there are cases where the authority is conferred upon other agents. In the present instance the contract with the appellant was made with viewers appointed under the drainage act, and conceding that the authority to employ a surveyor is in the viewers, a point we do not decide, still it is clear that they can do no more than

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employ him under the terms and for the purposes specified in the statute. As the viewers have no general powers upon this subject they can do only what the statute directs, and that, at the utmost, is to appoint the surveyor. What services he shall perform, and what compensation he shall receive, can not be fixed by the viewers, for their authority, granting it to go that far, terminates with the appointment. It is evident, therefore, that no recovery can be had upon the ground that the viewers designated the services and promised compensation.

The statute provides what services the surveyor shall perform, and designates the rate of compensation. The provisions of the act are, perhaps, not altogether clear, and, in some particulars, are incomplete, but we can not supply deficiencies nor remedy defects; we must act upon the statute as it exists, and not as it might seem to us it should be. Counsel's arguments as to what should be in the statute might have weight with the Legislature, who can change the law, but they can have none with courts, who are bound by what has been enacted. We are, therefore, to ascertain what the statute is. The only provision regarding the duties of the surveyor that we have been able to find is in section 4286 (R. S. 1881), but we find nothing in that section, even when construed with the utmost liberality, that makes it the duty of the surveyor to examine the records or prepare the reports of the viewers. That section provides that the surveyor shall assist the viewers in certain matters and shall make all calculations, measurements, estimates, and do such other work as pertains to his profession, as is necessary for the information of the viewers, but we find nothing in it providing that the surveyor shall prepare the report. It is his duty to do all the work pertaining to his profession and requiring professional skill and knowledge that may be necessary to supply the viewers with sufficient foundation for their judgment and report, but it is not his duty to make out the report itself. Nor is there anything in the section that

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makes it the duty of the surveyor to obtain the names of land-owners, and the provisions of section 4274 in terms casts that duty upon the petitioners for the establishment of the ditch. We are not required to decide what it is necessary for the surveyor to do in ascertaining facts in the line of his profession for the information of the viewers, for no such question is before us. What we do decide is that the surveyor is not charged with the duty of preparing the reports of the viewers or of ascertaining the names of the land-owners. This is the question, clearly defined and plainly marked, that is presented by the ruling on the motion to strike out. The items rejected are for services in making the reports and for examining the record to ascertain the names of land-owners, and not for supplying the viewers with information and facts within the line of the appellant's profession; on the contrary, the items left standing clearly indicate that for professional services rendered in ascertaining and imparting such information a recovery was awarded.

The duties of the surveyor are fixed by the statute, and it is only for services performed in the discharge of such duties that he is entitled to compensation. The statute is carefully worded, and so worded as to strictly confine the compensation for services performed under it.

A finding on the evidence can only be reviewed where there is a proper motion for a new trial, and here there is no motion at all.

We can not say that any error was committed by the court in taxing appellant with costs, for the reason that there is nothing in the record showing that the judgment on appeal was not the same as that rendered by the board of commissioners. Presumptions are always made in favor of the rulings of the trial court, and the appellant who impugns them must affirmatively show facts overcoming these presumptions. It is true that the appellant testified that his claim had not been paid, but this is far from showing that it had not been allowed. Indeed, the fair inference from the record is that

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an allowance had been made covering all the items of the complaint except those which we hold not recoverable, and this corresponds with appellant's statement in his brief; at all events we are unable to see any affirmative fact impugning the ruling of the court. Judgment affirmed.

Filed Sept. 26, 1884.

No. 11,108.

**BORCHUS ET AL. v. THE HUNTINGTON BUILDING, LOAN
AND SAVINGS ASSOCIATION.**

PRACTICE.—*Motion to Strike Out Interrogatories.*—*Bill of Exceptions.*—A motion to strike out interrogatories, and the ruling thereon, must be embraced in a bill of exceptions to save the question on appeal.

SAME.—*New Trial.*—Where error is assigned upon the overruling of a motion for a new trial, and the grounds stated in the motion are excessive damages, insufficient evidence, finding contrary to law, and error in admitting testimony, and there is no bill of exceptions filed, no question is presented.

MASTER COMMISSIONER.—*Evidence.*—*Bill of Exceptions.*—*Practice.*—Evidence admitted before a commissioner is not before the court unless preserved by bill of exceptions or by the commissioner in his report.

SAME.—*Testimony.*—*Record.*—A motion to make the testimony taken before a commissioner part of the record must be made before the court, on request, has acted upon the report and made a finding and judgment.

SAME.—*Evidence.*—*Report.*—*Waiver.*—Where the cause was referred to a special commissioner to report the facts and the evidence, and the facts alone were reported, the court might, on motion, or at its own instance, have required the commissioner to report the evidence; but where such action was not taken the error is waived.

SAME.—*Evidence before Commissioner.*—A judge has no power to sign a bill of exceptions containing evidence taken before a commissioner, but not brought before the court in a proper manner, and which was not before the court when the court made its finding upon the facts as reported by the commissioner.

SAME.—*Submission to Court.*—*Conclusions of Law.*—Where the commissioner reports his facts without the evidence, and the issues are submitted to the court for trial upon the findings, the court can not be required to state conclusions of law thereon, and such conclusions, if stated, are surplusage.

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BUILDING ASSOCIATION.—*Promissory Note. — Payment of Assessment. — Complaint. — Statement of Particulars.*—Where the payment of assessments in a building association are made conditions in a promissory note, in a suit thereon it is not required that the proceeding in making the assessment should be set out with particularity in the complaint.

PLEADING.—*Demurrer. — Capacity to Sue.*—A demurrer questioning the sufficiency of a complaint does not present any question as to the plaintiff's capacity to sue.

From the Huntington Circuit Court.

T. G. Smith and R. E. Smith, for appellants.

J. B. Kenner and J. I. Dille, for appellee.

BICKNELL, C. C.—In this case the appellants were the defendants below. They assign the following errors:

1. Overruling the demurrer to the complaint.
2. Striking out interrogatories to the plaintiff filed by the defendants with their answer.
3. Error of the court in its conclusions of law.
4. Overruling the motion for a new trial.
5. Overruling the motion to make the testimony taken before the commissioner a part of the record.
6. Refusing to sign the bill of exceptions.

Of these specifications of error the first only presents questions for consideration.

The second specification is unavailing, because the motion to strike out the interrogatories, and the ruling of the court thereon, are not made part of the record by a bill of exceptions. *Stott v. Smith*, 70 Ind. 298.

The fourth specification is unavailing, because the reasons for a new trial are: 1. That the damages are excessive; 2. That the amount of recovery is too large; 3. That the finding of the court is not sustained by sufficient evidence, and is contrary to law; 4. That the master commissioner erred in admitting certain testimony. Such reasons can not be considered here in the absence of a bill of exceptions. *Goben v. Goldsberry*, 72 Ind. 44; *Peterson v. McCullough*, 50 Ind. 35.

The fourth specification of error is also unavailing, because

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what took place before the commissioner as to the admission of evidence was not before the circuit court. Such matter is brought before the circuit court either by bill of exceptions signed by the commissioner, or by a statement thereof in his report. *Board, etc., v. Huston*, 12 Ind. 276; *Way v. Fravel*, 61 Ind. 162; *Lee v. State, ex rel.*, 88 Ind. 256. Here there was no bill of exceptions signed by the commissioner presented to the court at the hearing, and his report stated nothing as to the admission of evidence.

The fifth specification of error is unavailing, because the motion to make the testimony taken before the commissioner a part of the record was not made until after the court, at the request of the appellant, had acted upon the commissioner's report as it was, and had made a finding and judgment upon a submission of the issues to the court for trial.

The cause, by agreement of the parties, had been referred to a special commissioner to report the evidence and the facts; he had reported the facts without the evidence. The court, of its own motion, or at the request of either party, might, before discharging the commissioner, have required him to complete his report by adding the evidence, but no such action was taken; the objection to the incompleteness of the report had been waived by the appellants. *Preston v. Sandford*, 21 Ind. 156; *Hauser v. Roth*, 37 Ind. 89.

The sixth specification of error is unavailing, because the circuit judge had no authority to sign a bill of exceptions containing testimony taken before the commissioner, which had not been brought before the court in any proper manner, and was not before the court at all until long after the court had made its finding upon the facts as reported by the commissioner without the evidence.

There is a paper among the files which is styled "bill of exceptions." It purports to be signed by the special commissioner, and to set forth the evidence taken before him, but this paper did not accompany the commissioner's report; that report stated the facts only, without any evidence, and on the

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facts so reported the finding of the court was made. Neither party moved for an order upon the commissioner to complete his report by adding thereto the evidence; both parties treated the report as sufficient; each called upon the court to act thereon judicially; and after the commissioner's power was exhausted, the court made its finding upon the facts as reported on the 30th day of June, of June term, 1882. Nine months afterwards, on the 23d of March, 1883, the defendant Borchus procured from the former commissioner the paper aforesaid, styled "bill of exceptions," and then first presented the same to the court, and moved that it be made part of the record, and this the court rightly refused.

The demurrer to the complaint was filed by the defendant Harmon Borchus only, who assigned two causes of demurrer, to wit:

1. There is a misjoinder of parties, plaintiffs and defendants.
2. The complaint does not state facts sufficient to constitute a good cause of action against him.

The suit was brought by the appellee against said Harmon Borchus and his wife and one Michael Wilhelm, upon a note made by Harmon Borchus payable to the appellee, and a mortgage securing the same executed by Borchus and wife to the appellee; Wilhelm was made defendant as a subsequent purchaser of the mortgaged premises; the allegation as to him is that "since the execution of said note and mortgage he bought the mortgaged premises, and now claims to be the owner thereof."

The following is a copy of the note sued on:

"\$596.25. HUNTINGTON, IND., January 20th, 1876.

"For value received I promise to pay to the order of the Huntington Building, Loan and Savings Association of Huntington, Indiana, five hundred and ninety-six dollars and twenty-five cents, with interest on \$596.25, eight years after date of the incorporation, viz., January 28th, 1873, or whenever said association shall be declared by the board of directors legally ended; interest at the rate of six per cent.

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per annum, payable in equal weekly instalments on Saturday of each week ; and I do further promise and agree that should the week's instalment of interest hereon as aforesaid remain due and unpaid for three months, or should my stock in said association be forfeited for the non-payment of the weekly instalments of dues, or for any fines or assessments thereon, or for the non-payment of the taxes, ground rents or fire insurance premium on the property mortgaged to said association to secure the payment of this note, for three months after the same becomes due, as provided by the Constitution and by-laws of said association, then and in either case the whole amount of principal and interest of this note, together with all unpaid dues, fines and assessments on the shares of stock of said association owned by me, and all ground rents, fire insurance premiums, paid or advanced by said association on said mortgaged premises, shall become immediately due and collectible, all without relief from valuation or appraisement laws, and should this note be collected by suit, the judgment shall include the reasonable fee of plaintiff's attorney.

“(Signed) H. BORCHUS.”

The mortgage was in the statutory form, with the following special agreement: “And the mortgagors expressly agree to pay the sum so secured without relief from valuation or appraisement laws.” It was signed by Harmon Borchus and Catherine Borchus.

The complaint alleged the execution of said note and mortgage, and that said Harmon Borchus agreed to pay the plaintiff weekly dues, interest, fines and assessments on ten shares of its stock owned by him, and that said weekly dues and interest were \$3.45 per week, and that said plaintiff failed to pay his said dues and interest, and had been delinquent therefor for more than three months, and that said Harmon Borchus, under the constitution and by-laws of said association, was assessed for non-payment of his said dues in the sum of \$28, which had been due for more than three months, and that the said stock of said Harmon Borchus had been as-

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sessed in the sum of \$222, and that said interest and assessment had been due for more than three months, and that defendant, although often requested, has refused to pay the same, and that said stock had been forfeited to the plaintiff, and that said note had become due and payable. The complaint demanded a personal judgment against Harmon Borchus and the foreclosure of the mortgage against all the defendants.

Here was certainly no misjoinder of plaintiffs or defendants; the plaintiff was mortgagee; the defendants were the mortgagors and an alleged subsequent purchaser of the mortgaged property; and a sufficient cause of action was stated. Here was a promissory note; it imported a consideration; by its own terms it was to become due upon a certain event, to wit, failure for three months to pay an assessment. The complaint averred the making of the assessment and the failure for three months to pay it; thereby the note became due. It has been held that when a note is to become due according to conditions expressed in another instrument, which is referred to in the note, said conditions not being stated in the note itself, copies of both the note and the instrument referred to must be annexed to the complaint. This was held in *Busch v. Columbia City, etc., Ass'n*, 75 Ind. 348. But that is not this case; here the conditions are stated in the note itself; no other writing is referred to as containing any of them, and the promise is not made to pay under, pursuant to, or in conformity with any other writing. The complaint was, we think, sufficient. *Anderson Building, etc., Ass'n v. Thompson*, 88 Ind. 405. It is not necessary, in such a case, to set out particularly the proceedings of the plaintiff in making the assessment; if there were no assessment, or if there were such irregularity in the proceedings as to make the assessment invalid, that would be proper matter of defence. The appellants, in discussing the demurrer, claim that the plaintiff had not capacity to sue, but that question is not raised by the demurrer in this case. *Wiles v. Trustees, etc.*, 63 Ind. 206; *Rogers v. Lafayette, etc., Works*, 52 Ind. 296.

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There was no error in overruling the demurrer of Harmon Borchus to the complaint.

The defendants Borchus and wife filed an answer in three paragraphs, to wit:

1. The general denial.
2. Payment before suit brought.
3. A counter-claim claiming credits for an excess of payments made weekly, alleging that the only liability of said defendants could be for assessments necessary to pay off the plaintiff's creditors, who were such at the time of the final winding up of the affairs of the association, and that the assessments sued for are largely in excess of the amount necessary to finally settle the affairs of said association, and praying that his said excess of weekly payments be deducted from any amount found due, etc.

4. That plaintiff was organized for eight years from January 28th, 1873, which time expired on January 28th, 1881; that said Harmon Borchus is a member of said association; that said pretended assessment has no existence, in fact, because the plaintiff's trustees, in fixing its amount, failed to take into consideration certain real estate of said association of the value of \$2,200, and sufficient to pay all the liabilities of the association without any assessment on stock; that the debts of the association did not exceed \$2,200, to pay which the trustees assessed one hundred shares of stock \$22 each, when there were five hundred shares subject to assessment, of which one hundred and forty-eight shares were not assessed at all. Wherefore, etc.

The record states that issue was joined on the third and fourth paragraphs of the foregoing answer, but there is no reply in the record to the fourth paragraph, and no answer to the counter-claim stated in the third paragraph; and, as yet, no answer to the complaint had been filed by the defendant Wilhelm, although he had appeared in the cause.

At this stage of the proceedings, the cause, by agreement of the parties, was referred to the special commissioner "to

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report the evidence and the facts, and his conclusions thereon." At next term he reported as follows: "I now submit the following report of the facts, as found from the evidence, to wit." The report contained the facts only, without any statement of the evidence, or of any matter relating to the admission or rejection of evidence.

Upon the filing of this report the defendants moved the court to give its conclusions of law in writing upon the facts found by the commissioner, and the plaintiff moved for judgment in its favor upon the report.

The defendant Wilhelm then filed his answer to the complaint, viz., the general denial.

The record states that the issues were then submitted to the court without a jury, and that the court stated as its conclusions of law, that "the law is for the plaintiff on each several issue, and that the plaintiff ought to recover judgment herein." The defendants excepted to the conclusions, and they have assigned as their third specification of error that the court erred in its conclusions of law.

But this was not a case in which, under our statute, conclusions of law may be required to be stated. The special commissioner having, without objection, reported the facts without the evidence, and the parties having, in effect, consented to such report, all that the court could do was to make its finding upon the facts as reported, and when, as the record shows, the issues were submitted to the court without a jury upon the facts reported, the statement by the court as a conclusion of law, "that the law was for the plaintiff, and that on each several issue the plaintiff ought to recover," was mere surplusage, and the defendants' exception thereto, and assignment of error thereon, present no question.

The court then made the following finding: "That said plaintiff's cause of action is based upon a promissory note and mortgage, executed by the defendants, the Borchuses, and that the principal and interest due at this date amount to

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\$596.25, and that plaintiff is entitled to a foreclosure of its said mortgage against all of said defendants."

Judgment was rendered against said Harmon Borchus personally for \$596.25, and costs, and for foreclosure against all the defendants.

The defendants, after a motion for a new trial overruled, appealed from the judgment.

As already stated, the motion for a new trial presents no question, because the evidence is not in the record, and the other errors assigned being unavailable as hereinbefore shown, the judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed May 29, 1884. Petition for leave to file petition for a rehearing overruled Oct. 30, 1884.

No. 11,494.

JONES, ADMINISTRATRIX, v. JONES.

JUDGMENT.—*Motion in Arrest.*—*Paragraph of Complaint.*—*Verdict.*—A motion in arrest directed to so much of the finding as may be based upon one paragraph of a complaint will not lie, though that paragraph be bad.

DECEDENTS' ESTATES.—*Agreement among Heirs.*—*Purchase at Administrator's Sale.*—*Resulting Trust.*—*Evidence.*—*Consideration.*—Where a recovery is sought upon an agreement among the heirs of a decedent, that the personal property of the estate should be bought at the administrator's sale for the benefit of the heirs, and the personal property, subsequent to the purchase by one of the heirs, was sold by him for a price greater than that paid by him, and a share of this increase is claimed, it is necessary to show the existence of a trust, the foundation of which is the intention of the parties, in an agreement made in good faith; and where no facts were alleged from which fraud could be imputed, and the evidence did not show that the purchaser had used any money of the plaintiff, or money furnished on behalf of the plaintiff, in paying for the property acquired in the name of the purchaser, no resulting trust is proved. No consideration to support a trust is shown.

From the Harrison Circuit Court.

Jones, Administratrix, v. Jones.

W. T. Zenor and S. J. Wright, for appellant.

W. N. Tracewell and R. J. Tracewell, for appellee.

BLACK, C.—This was a proceeding upon a claim in favor of the appellee, against the estate of William T. Jones, deceased, the appellant being the administratrix thereof.

The statement of the claim was in the form of a complaint consisting of two paragraphs, to which the appellant answered in three paragraphs: *First*. The general denial; *Second*. Payment by the intestate in his lifetime; *Third*. Set-off. The appellee replied by denial to the second and third paragraphs of the answer. A change of judge was granted, and an attorney was appointed as judge *pro tempore*, before whom the cause was tried, the result being a finding in favor of the appellee for \$270.55. A motion for a new trial and a motion in arrest of judgment were made by the appellant and were overruled, and judgment was rendered on the finding.

The motion in arrest was in writing, and asked that the judgment be arrested on so much of the finding as was based on the second paragraph of the claim and complaint, namely, the sum of \$87.75 claimed in that paragraph, alleging as reasons that the second paragraph did not state facts sufficient to constitute a cause of action, and that it was too indefinite and uncertain to render judgment upon.

Where a complaint contains more than one paragraph, and there is a general verdict or finding for the plaintiff, a motion in arrest directed to so much of the verdict or finding as may be based on a single paragraph of the complaint will not lie, though that paragraph be bad. See *Waugh v. Waugh*, 47 Ind. 580; *Spahr v. Nicklaus*, 51 Ind. 221; *Harris v. Rivers*, 53 Ind. 216.

The first paragraph of the claim was for money loaned by the appellee to the intestate.

The second paragraph alleged an agreement by and between the heirs of Julia Jones, deceased, mother of the claimant and of the appellant's intestate, that the property offered

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for sale at an administrator's sale of the personal property of the estate of said Julia Jones, deceased, should be purchased for the benefit of said heirs; that the appellant's intestate, at said sale, purchased certain plank road stock, at a price stated, for the benefit of said heirs, which he soon afterwards sold for their benefit at a greater price stated. Upon this transaction the claimant based a demand for \$87.75.

If he could recover upon this part of his claim, it was necessary to show the existence of a trust, the foundation of which was the intention of the parties in an agreement made in good faith. No facts were alleged from which fraud could be imputed, either actual or constructive.

To support such a trust, a consideration was necessary. The evidence did not show that in the payment for the stock, which appellant's intestate bought in his own name, said purchaser used any money or property furnished by the appellee, or which the purchaser or any other person furnished for the appellee, by way of loan or otherwise, or that belonged to him or in which he had any interest. Therefore, the evidence did not show a resulting trust. See *Minot v. Mitchell*, 30 Ind. 228; *Pearson v. East*, 36 Ind. 27; *Pomeroy Eq. Jur.*, sec. 1031, *et seq.*; *Perry Trusts*, sec. 124, *et seq.*

An examination of the evidence indicates that the court in its finding allowed the claim set up in the second paragraph.

Among the grounds stated in the motion for a new trial, it was assigned that the amount of the recovery was too large; and, for the reasons above stated, we think that upon this ground a new trial should have been granted.

PER CURIAM.—Upon the foregoing opinion, the judgment is reversed, at the appellee's costs, and the cause is remanded for a new trial.

Filed Sept. 20, 1884.

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No. 10,775.

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97	191
128	496
97	191
149	145
97	191
165	511

PRACTICE.—Amendment.—Demurrer.—An amendment of a pleading, after a demurrer to it has been sustained, takes the original out of the record, and no error can be assigned upon the ruling on the demurrer.

SAME.—Open and Close.—Complaint by a commission merchant, for commissions and advances made in the purchase of wheat for the defendant. Answer, that no wheat was purchased, but the transaction was a gaming contract and wager upon the future price of wheat. Reply, general denial.

Held, that the plaintiff had the open and close.

GAMING CONTRACT.—Public Policy.—Sale.—Delivery.—A contract in form for the purchase of wheat, to be delivered at a future day, with the intention of both parties that the property is never to be delivered, but that settlement shall be made by payment of the difference in price at the date fixed for delivery as compared with the purchase price, is a gaming contract and void as against public policy. *Aliter*, if this be understood by only one of the parties.

From the Johnson Circuit Court.

R. M. Johnson, for appellant.

G. M. Overstreet, *A. B. Hunter*, *H. C. Allen* and *L. H. Bisbee*, for appellees.

FRANKLIN, C.—Appellees, as commission merchants, sued appellant for commission and money advanced in the purchase of five thousand bushels of wheat. The transaction was consummated through the Chicago Board of Trade.

The defendant answered that no wheat was actually purchased; that the transaction was a contract upon margins, and gaming upon the future price of wheat, and to be settled by paying or receiving at a future day the difference between the price of wheat then and at the date of the contract; that the advancements of margins made were to keep the payment of differences secure, and that the contract was contrary to public policy, illegal and void.

Appellees replied by a denial. There was a trial by jury, verdict for the plaintiffs, and, over a motion for a new trial, judgment was rendered upon the verdict.

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The errors assigned are :

1st. Overruling the motion for a new trial.

2d. Overruling the demurrer to the complaint.

3d. Sustaining the separate demurrers to each paragraph of the answer.

As to the third specification, appellant did not stand upon the rulings upon the demurrers to his answer, but filed amended paragraphs of answer; and the original ones to which the demurrers were sustained are not in the record. Therefore, this specification presents no question for consideration. As to the second specification, appellant has not discussed or even referred to it in his brief. It must, therefore, be considered as waived. The overruling of the motion for a new trial is the only specification to be considered.

The reasons stated for a new trial are :

First. The verdict is not sustained by the evidence.

Second. The verdict is contrary to law.

Third. Error occurring at the trial in awarding the plaintiffs the right to open and close the argument.

Fourth. Error in admitting the testimony of Lee Hunt as to the contents of a telegram.

Fifth. Error in giving instructions.

We will consider these specifications in the inverse order of their statement. The instructions complained of read as follows :

“ 1. Plaintiffs claim that defendant is indebted to them in the sum of \$12.50 as commission due them as commission merchants in the purchase of five thousand bushels of wheat; also, that they purchased in the city of Chicago five thousand bushels of wheat for the defendant, and by the terms of such sale the defendant was required to place in their hands a sufficient sum of money to protect and indemnify them against loss, and by reason of the decline in wheat, the sum of \$200 in the hands of plaintiffs belonging to the defendant was not a sufficient protection and indemnity to them against loss; and after notice to defendant to place in their

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hands a greater sum of money, they sold the wheat, which they claim the right to do, at a loss to them of \$487.50, from which deduct the sum of \$200, made a clear loss of \$287.50.

“2. The defendant insists that they purchased no wheat, nor did the plaintiffs sell him any wheat, but that in the month of February, 1882, he contracted with plaintiffs for the purchase of 5,000 bushels of wheat, to be delivered in the month of March, 1882, with the mutual understanding that no wheat was purchased or sold or would be required to be delivered, but that the transaction should be adjusted between the parties upon the bases of the market value of wheat in Chicago at the date of the pretended purchase and pretended sale (or maturity of the contract), when, in fact, no wheat was bought or sold. In brief, a bet or wager on the price of wheat at a given time.

“3. If defendant did purchase of plaintiffs 5,000 bushels to be delivered to him at a future date, this would be a legitimate and proper transaction, and it is competent for parties to make such contract.

“4. It is for you to determine from the evidence whether the plaintiffs were, by the nature of the contract, authorized to sell the wheat before the maturity thereof, and whether the plaintiffs should have served notice upon defendant that a further deposit of money was demanded from him to make his contract good, and if, in point of fact, such notice was served on defendant.

“5. If by the terms of the contract and nature of the business, the plaintiffs required of the defendant any sum of money ‘to make his deal good,’ it was the duty of plaintiffs, before they could ‘close him out,’ or sell his wheat, to notify him of such fact and give him a reasonable time to respond. Unless there was such a usage or custom in the business being transacted, and in connection with the transaction out of which the alleged indebtedness grew, of which the defendant was advised or had notice, and demand was waived by

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him, then the plaintiffs, by selling the wheat before the date of delivery of the wheat or the maturity of the contract for delivery, could not sell the same and charge the defendant with the loss thereon.

“6. If the plaintiffs purchased the wheat for the defendant, and by reason of his failure, he failed to put up further margins to protect them after ‘a call’ therefor, and by reason of such failure, they did, to protect themselves from loss while holding such wheat for the defendant, sell the same, and a loss was incurred, and this was within their contract, and so contemplated and understood by them, then the defendant must make the loss good, and respond in damages to the extent of such loss.

“7. If the sum of money sued for was paid out at the request of defendant, or a liability was incurred by the plaintiffs at request of defendant, whereby they were required to pay out such sum of money upon such liability for his use and benefit, then he should refund such sum of money thus paid out.

“8. If it was the mutual contract of parties plaintiffs and defendant, and they so mutually understood the same, that no wheat was actually to be delivered, and that the contract was not, in fact, to be performed, and ‘the deal’ should be settled upon the basis of the contract and market price, then the plaintiffs can not recover in this case. But it is not sufficient that the defendant so understood the contract or ‘deal,’ but the plaintiffs must be a party to such contract and understanding. If it was a proper and lawful contract on their part, and entered into by them in good faith, intending to perform the same, then it is immaterial as to the private understanding of defendant.”

The class of contracts that forms the subject of this suit has become so extensive in business transaction, and has recently so often been before the courts, that we deem it advisable to give the subject a more extended investigation than usual. Trading in options, and buying what are called “fu-

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tures," have become parts of the commercial transactions of the country.

It was formerly held that when the vendor had neither the goods, nor entertained any contract to buy them, at the time of the sale, nor had any reasonable expectation of receiving them by consignment, but intended to go into the market and buy the articles he engaged to deliver, no action could be maintained on such contract. But that rule has been changed by the later authorities, and there have been numerous decisions, particularly in this country, holding that the vendor may contract for the sale of an article not in his possession, and this doctrine seems to be entirely in accordance with the rules of public policy. *Bryan v. Lewis*, Ry. & Moody, 386, and note a; *Wolcott v. Heath*, 78 Ill. 433; *Brua's Appeal*, 55 Pa. St. 294; *Brown v. Hall*, 5 Lans. (N. Y.) 177; *Noyes v. Spaulding*, 27 Vt. 420; *Hibblewhite v. McMorine*, 5 M. & W. 462; *Kingsbury v. Kirwin*, 43 N. Y. Super. Ct. (J. & S.) 451; *Pixley v. Boynton*, 79 Ill. 351; *Rumsey v. Berry*, 65 Me. 570; *Disborough v. Neilson*, 3 Johns. Cas. 81; *Cassard v. Hinman*, 1 Bosw. (N. Y.) 207; *Ashton v. Dakin*, 4 H. & N. 867; *Chapman v. Campbell*, 13 Grat. 105; *Cole v. Milmine*, 88 Ill. 349; *Logan v. Musick*, 81 Ill. 415; *Gregory v. Wendell*, 39 Mich. 337.

In the last case cited, the court says: "The mercantile business of the present day could no longer be successfully carried on if merchants and dealers were unable to purchase that which as to them had no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy; and it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time."

There is a difference, and a distinction must be made, between a contract where there is a *bona fide* intent to fulfil the agreement according to its terms, and those where the difference in the market price is to be paid.

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There can be no doubt but that sales of a commodity to be delivered at some other time are valid, but if the parties agree at the time of making the contract that no title to any property shall pass or any delivery be made, or when, from the nature of the contract, it must be apparent that the intent of the parties was such that at some future specified time the losing party should pay to the other the difference between the selling price at that time and the time of making the contract, it would be a contract which the law would refuse to enforce, for the reason that it is clearly a wager upon the price of the commodity at some future day. *Yerkes v. Salomon*, 11 Hun, 471; *Grizewood v. Blane*, 11 C. B. 526; *Story v. Salomon*, 71 N. Y. 420; *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 33 (25 Am. R. 349); *Bigelow v. Benedict*, 70 N. Y. 202 (26 Am. R. 573); *Maxton v. Gheen*, 75 Pa. St. 166; *Peabody v. Speyers*, 56 N. Y. 230; *Williams v. Tiedemann*, 6 Mo. App. 299; *Sampson v. Shaw*, 101 Mass. 145 (3 Am. R. 327); *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Clarke v. Foss*, 7 Biss. 540; *Rudolf v. Winters*, 7 Neb. 125; *Waterman v. Buckland*, 1 Mo. App. 45; *In Re Green*, 7 Biss. 338; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Beveridge v. Hewit*, 8 Brad. 467; *Enderby v. Gilpin*, 5 Moore, 571; *Swartz's Appeal*, 3 Brewst. 131; *Barnard v. Backhaus*, 52 Wis. 593; *Everingham v. Meighan*, 15 Cent. L. J. 255; *Cameron v. Durkheim*, 55 N. Y. 425.

In the case of *Rumsey v. Berry*, *supra*, the court very clearly defines the line which separates the two classes of contracts, the legal from the illegal. In that case, it was said: "A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is

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what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure."

In the case of *Kent v. Miltenberger*, 16 Cent. L. J. 433, in the opinion by THOMPSON, J., it was held that where by the terms of the contract, the commodity, at the maturity of the contract, may be required to be delivered, or damages recovered for the breach, unless a delivery is waived by the opposite party, the contract will be held to be legal, unless there is an express agreement made, at the time of the contract, that the property should not be delivered, and that such an agreement, subsequently made, would not vitiate the contract.

In the case of *Cobb v. Prell*, 16 Cent. L. J. 453, in the opinion by MCCRARY, J., it was held that the fact that the intention of the parties to a contract of the sale of commodities for future delivery is, that there shall be no actual delivery, but that the transaction shall be settled by the payment of the difference between the selling and market price, will render such contract void, and that all the circumstances and acts of the parties may be considered in determining their intention. We think this case the better authority. A contract to sell a commodity for future delivery, coupled with an express agreement, made at the time, that the commodity, at the maturity of the contract, shall not be paid for or delivered, but shall be settled for by difference on prices, is no contract of sale at all. And well may the learned court in that case admit that such a contract is illegal and void.

The trouble arises where, at the date of the contract, there is no express agreement as to payment and delivery, and where those questions are to be settled by implication, based upon the understanding and intention of the parties.

In the case of *Union Nat'l Bank v. Car*, 16 Cent. L. J. 320, it was held, that "The validity of option contracts depends upon the mutual intention of the parties. If it is not the in-

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tention in making the contract, that any property shall be delivered or paid for, but that the fictitious sale shall be settled on differences, the contract is illegal. But if it is the *bona fide* intention of the seller to deliver, or the buyer to pay, and the option consists merely in the time of delivery within a given time, the contract is valid, and the putting up of margins to cover losses which may accrue from the fluctuations of prices, etc., is legitimate and proper."

In the case of *Justh v. Holliday*, 17 Cent. L. J. 56, it was held: "Where a contract is made for the delivery or acceptance of securities at a future day, at a price named, and neither party at the time of making the contract, intends to deliver them or accept them, but merely to pay differences, according to the rise or fall of the market, the contract is a gambling one and is void as contrary to public policy. The endorser of a promissory note given on account of such dealings as are recognized as gambling transactions can rely upon their illegality as a defence to an action on the note. In an action to recover money, where the defence set up is that the contract was a stock gambling one, the real question for determination is the *bona fides* of the transaction. It is not the form but the intent with which the scheme was planned. If neither party contemplates that there should be a delivery of the stock, but merely to pay differences according to the rise or fall of the market, the contract is a gambling one."

In the case of *Bryant v. Western Union Tel. Co.*, 17 Cent. L. J. 361, the court says: "The complainants never buy or sell for present delivery, but always deal in futures and upon margins. Whenever the required margin is placed in the hands of complainants, they will buy or sell, as customers desire, grain, etc., at the last quotation of the Chicago Board of Trade. This is always for the next or succeeding month's delivery, and the deal is taken by the complainants themselves. The customer must always keep his margin good, and that without notice; and if any time before the time fixed for the delivery, the market in Chicago goes against the customer to the extent of

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his margin, the trade is closed and the complainants take the margin and the customer is not personally liable, the extent of his loss being his margin. If, however, the market should go in favor of the customer, he may call for a settlement at any time and without regard to the maturity of his contract, and he is then paid the difference between the then market price and the price at which he bought or sold, less a sum which is called by complainants 'a commission.' This sum, which is one-fourth of a cent on each bushel of grain which is alleged to be bought or sold, is not a commission, as the complainants always take the deal themselves, and do not pretend to buy or sell to others for the account of the customer, but is really the odds which the customer gives them in the wager on the future of the market. It is perhaps true if the customer keeps his margin good, so that he can not be closed out, and does not exercise his right to settle upon the basis of the difference in the prices of the grain, etc., he can demand a compliance with the contract and a delivery; but if the course of business between the complainants and their customers is to settle their alleged contract by a payment of the differences in the market rates, the fact that a customer may, under certain circumstances, require an actual delivery, does not relieve the complainants from the charge of carrying on a 'bucket-shop.' It is the general course of a man's business which defines and classifies it. If 'bucket-shop' means a place where wagers are made upon the fluctuations of grain and other commodities, then I think the evidence shows the complainants keep such a 'shop,' and are of the class to which defendants are prohibited from furnishing the market quotations of the Chicago Board of Trade. This is gambling, and a very pernicious and demoralizing species of gambling, which a court of equity should not protect, even if the board of trade had not taken the action it has. It is true that this kind of gambling has not yet been made criminal by the statute law of the State, still if a case of wager is made out, none of the State courts will enforce such contracts. *Sawyer v.*

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Taggart, 14 Bush, 727. Gambling on the fluctuation in the market prices of stocks, grains, etc., is against the public policy of the State, though it may not be a crime punishable by fine or imprisonment."

In the case of *Cunningham v. National Bank of Augusta*, 17 Cent. L. J. 470, it was said: "It is manifest that the consideration of the note sued on is for, and on account of dealings commonly called futures. Is such a transaction in the nature of gaming? If so, then, the note was void at the time it was given; and no subsequent transfer could revive or give vitality or any legal validity to a contract thus tainted and poisoned at its birth. * * The plea expressly alleges the transaction to be 'a wagering and gaming contract.' But what is the transaction termed futures? It is this: one person says, 'I will sell you cotton, at a certain time in the future, for a certain price; you agree to pay that price, knowing that the person with whom you have to deal has no cotton to deliver at the time; but with the understanding that when the time for delivery arrives, you are to pay me the difference between the market value of the cotton and the price you agreed to pay, if cotton declines; and if cotton advances, I am to pay you the difference between what you promised to give and the advanced market price.' If this is not a speculation on chances, a wagering and betting between the parties, then, we are unable to understand the transaction. A betting on a game of faro, brag or poker can not be more hazardous, dangerous or uncertain. * * * What are some of the consequences of these speculations on 'futures'? The 'faithful chroniclers of the day' have informed us that, as growing directly out of these nefarious practices, there have been bankruptcies, defalcations of public offices, embezzlements, forgeries, larcenies and deaths. Certainly, no one will contend for one moment, that a transaction fraught with such evil consequences is not immoral, illegal and contrary to public policy."

In the case of *Rudolf v. Winters*, 7 Neb. 126, the Supreme Court of that State held, that "A contract to operate in grain

options, to be adjusted according to the differences in the market value thereof, is a contract for a gambling transaction which the law will not tolerate. It is *contra bonos mores*, and against public policy." And a number of the heretofore cited authorities, with others, are referred to in support thereof.

In the case of *Lyon v. Culbertson*, 83 Ill. 33, the following language is used: "The fact that no wheat was offered or demanded, shows, we think, that neither party expected the delivery of any wheat, but, in case of default in keeping margins good, or even at the time for delivery, they only expected to settle the contract on the basis of differences, without either performing or offering to perform his part of the agreement; and if this was the agreement, it was only gaming on the price of wheat, and if such gambling transactions shall be permitted, it must eventually lead to what are called 'corners,' which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain, as well as the producer, and are pernicious and highly demoralizing to the trade. A contract, to be thus settled, is no more than a bet on the price of grain during or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is, in all but name, a gambling on the price of the commodity, and the change of names never changes the quality or nature of things. * * * This seems to be a subtle invention to abrogate well established, fair and just principles of the law of contracts, and not only so, but to the great injury of fair and legitimate trade."

In the case of *Brua's Appeal*, 55 Pa. St. 294, it was said: "Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community, no matter by what name it may be called. It is the same whether the promise be to pay on the color of a card, or the fleetness of a horse, and the same numerals indicate how much is lost and won in either case, and

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the losing party has received just as much for the money parted with in the one case as the other, viz. ; nothing at all. The lucky winner of course is the gainer, and he will continue so until fickle fortune in due time makes him feel the woes he has inflicted on others. All gambling is immoral. I apprehend that the losses incident to the practice disclosed * * have contributed more to the failures and embezzlements by public officers, clerks, agents and others acting in fiduciary relations, public and private, than any other known, or perhaps all other causes. * * In the train of its evils, there is a vast amount of misery and suffering by persons entirely guiltless of any participation in the cause of it."

We conclude from the foregoing authorities, that in this class of cases, the correct rule is, that where a commodity is bought for future delivery, no matter what the form of the contract is, the law regards the substance and not the shadow, and if the parties mutually understood and intended that the purchaser should pay for and the seller should deliver the commodity at the maturity of the contract, it is a legal and valid transaction, and the fact that the purchaser is required to deposit a margin, and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin and increase the same like the purchaser in order to secure the delivery at maturity, does not vitiate the contract. But if at the time of the contract, it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for, nor to be delivered, but that the contract was to be settled and adjusted by the payment of difference in price; if the price should decline, the purchaser paying the difference; if it should rise, the seller paying the advance, the contract price being the basis upon which to calculate differences—in such case, it would be a gambling contract and void, and the deposits of margins are only to be considered as attempting to secure the terms of the bet on prices at some future time.

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But it is insisted by the appellees that they only acted as agents of the appellant in the premises, and as such agents they paid the money at the request of appellant, and that they have the right to recover the same back, regardless of the question as to whether the contract for the purchase of the wheat was legal or illegal.

The suit is upon the implied contract of the appellant to pay. The appellees made the contract for the purchase of the wheat through their agent in the Chicago Board of Trade; they never disclosed to appellant the name of the seller, and if the contract was illegal, they can not be considered ignorant of its nature. They claim to be commission merchants, doing business in the Chamber of Commerce at Indianapolis, and through commission merchants in Chicago, under the rules and regulations of the Board of Trade at Chicago; they purchased for the appellant 5,000 bushels of wheat, and paid to said commission merchants in Chicago \$200 that appellant had deposited with them as a margin. The price of wheat declined, and the defendant refused to deposit further margins to carry the "deal;" appellees "closed him out," and settled with the commission merchants at Chicago by paying them the further sum, for differences in prices, of \$287.50; hence the appellees participated in, and were the chief manipulators of, the whole transaction, and well knew all the facts. If it was a valid and legal transaction, they would have a right to recover back the money which they had paid for appellant; but if the transaction was a gaming one, illegal and void, they would not have a right to recover; for, if illegal, they were *in pari delicto*, and will not be aided by the courts in profiting by their own wrong. They will be left where they are found, to abide the consequences of their own illegal transaction. *Judah v. Trustees, etc.*, 23 Ind. 272; *Root v. Stevenson*, 24 Ind. 115; *Dumont v. Dufore*, 27 Ind. 263; *Bartlett v. Smith*, 13 Fed. R. 263; *Steers v. Lashley*, 6 T. R. 61; *Holman v. Johnson*, Cowper, 341; *Rountree v. Smith*, 15

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Reporter, 609 ; *Irwin v. Willard*, Chicago Legal News, March 12th, 1884.

If the seventh instruction stood alone, it might, perhaps, sustain appellees' above position, and in that case we think it would be erroneous, as applicable to the facts in this case, but it is connected with, and qualified by the preceding and succeeding instructions, which make the validity of the contract to depend upon the mutual intention of the parties. All the law applicable to the case is not required to be stated in one instruction ; they must be considered as a whole, and if together they present the law of the case correctly, and without contradiction, objections to any one of them separately will not be available. *Western Union Tel. Co. v. Young*, 93 Ind. 118.

We do not think that there is any available error in the instructions ; nor do we think that there is any error in the admission of evidence, in so far as the questions presented are concerned, or the giving of the plaintiffs the right to open and close the evidence and the argument to the jury.

It is further earnestly insisted by appellant that the evidence does not sustain the verdict of the jury.

The material parts of the testimony are, substantially, as follows :

John R. Fesler testified that appellant, Whitesides, lived in Johnson county, Indiana, and that he, as said Whitesides' agent, on the 28th day of January, 1882, gave to Hunt & Hamilton, at Indianapolis, a verbal order to purchase at Chicago 5,000 bushels of wheat for March delivery ; he knew they were dealing in optional grain trades at Chicago ; had previously had deals with them, and Mr. Whitesides had had one deal with them ; he knew they were dealing through the Board of Trade at Chicago, and made the order with a view of such dealing ; he was familiar with their manner of trading through the Board of Trade at Chicago ; some two weeks after he made the order for Mr. Whitesides, Mr. Hunt asked him about Mr. Whitesides, and said that his margins were

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about exhausted, and wanted witness to see him and have him send more money; he saw Mr. Whitesides and spoke to him about it, who said that he was going to Indianapolis, and that he would see Hunt & Hamilton; at the time of giving the order Whitesides had money on deposit with Hunt & Hamilton; did not know how much, nor for what purpose; supposed it was to protect the trade; it was customary to deposit money for that purpose, and if not sufficient at any time to protect an agent in carrying a trade, it was customary to pay up more money, or be sold out, at the pleasure of the agent who was carrying the trade.

Lee Hunt testified that the plaintiffs were commission merchants, doing business in the city of Indianapolis, in the board of the Chamber of Commerce; that before this transaction, Mr. Fesler introduced Mr. Whitesides to them at their office, and Whitesides then said he wanted to make some trades; would not be there often, and any order that Mr. Fesler would give would be all right. Mr. Whitesides came in afterwards and directed the purchase of five thousand bushels of wheat. After that Mr. Fesler ordered them to purchase other five thousand bushels of wheat for Mr. Whitesides. Mr. Whitesides had left money with them and had made a trade previous to this one. When Fesler left the order, witness telegraphed to Chicago, and the five thousand bushels of wheat was purchased for Mr. Whitesides for March delivery, at \$1.32½ per bushel, through Murphy & Co., members of the Board of Trade in Chicago. Afterwards wheat declined, and he drew on Mr. Whitesides for more money; he failed to respond. Witness then "asked Fesler in regard to Mr. Whitesides' responsibility to respond to losses on wheat, and he said that Whitesides was able to protect it, and would do so." Whitesides failed to pay more money, and the trade was closed out at \$1.23 per bushel. The firm of Hunt & Hamilton was liable to their correspondent in Chicago for any purchases which they ordered made, and kept a deposit there to protect any orders sent by them, "and

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this loss was charged up to their account," and they settled by paying the amount of the loss, \$487.50, upon this transaction; they were entitled to a commission of \$12.50, to be divided between their firm and the Chicago firm, all of which they paid; Mr. Whitesides had previously left with them \$200, for the purpose of protecting any trade he might make with or through them.

This purchase was made in accordance with the rules and regulations of the Chicago Board of Trade. There was no written contract. These rules and regulations were contained in a volume, and were too numerous to read in evidence, as but few of them were applicable to this transaction. Did not know whether they had any wheat in Chicago at the time of this transaction; had no special contract with Mr. Whitesides, simply held his \$200 to secure them against loss, and used it in that way; did not know whether the seller deposited any money as margins or not.

William D. Whitesides testified that he lived in Johnson county, Indiana; that he had a slight acquaintance with the plaintiffs, Hunt & Hamilton; he was introduced to them by Mr. Fesler, at their office in Indianapolis, at the Chamber of Commerce, in the Board of Trade building; he then told Mr. Hunt that he "thought of making a purchase in margins;" Hunt asked what he wanted to buy; he said wheat; Hunt then said that he would have to put up \$200 on five thousand bushels of wheat; nothing was then said about Fesler acting as his agent; afterwards Mr. Hamilton told him that any word that he might send by Col. Fesler would be carried out; he afterwards told Fesler that he had money on deposit with Hunt & Hamilton, amounting to \$200, and when he thought it to be a good time to buy, to do so; he said that he wanted to buy wheat, and when he thought that it was a good time, he would also buy for witness; he afterwards got word from Mr. Hunt that he had bought five thousand bushels of wheat for him, through Mr. Fesler; Mr. Fesler afterwards told him the same; this was some two

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weeks after the purchase; they drew on him for money; had no understanding with Hunt & Hamilton about the seller putting up any margins; "he did not expect any wheat to be delivered, but expected it to be settled on differences of prices;" had "settled the transaction before this one on the difference between the selling and the purchasing price of five thousand bushels of wheat in Chicago;" Hunt & Hamilton told him they owed him \$12.50 besides their commission upon that sale of five thousand bushels of wheat; they had no authority from him to sell the second five thousand bushels of wheat; did not see them after the purchase; did not expect any wheat to be delivered, and knew nothing about any being delivered; nothing was said about delivering any wheat either in the first or second transaction, and he was not expecting any to be delivered even at the time for delivery, unless the wheat was paid for, but he supposed that there was no actual wheat in the trade, and that a settlement would be made upon differences in prices.

In rebuttal, Fesler testified that Hunt & Hamilton required margins to keep a man's trade good, and if the parties held the contract at the time of its maturity, the wheat would be delivered; that on contracts made like this one for wheat through Hunt & Hamilton, where the parties hold until the time the contract matures, the wheat is delivered; he had had deliveries made to him of oats and corn, but not of wheat. (This testimony was objected to, but its admission was not stated as a reason for a new trial.)

Lee Hunt testified in rebuttal, that in this transaction between plaintiffs and defendant, there was no intention but what the goods would be delivered if the contract was held until it matured; they had had a great many goods delivered; they had such a delivery yesterday; the wheat in this contract, when matured, was delivered out on the sale that was made on account of Whitesides failing to keep his contract good; he knew this only from the fact that when in Chicago he went through the books with Murphy. (A motion to

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strike out this testimony was overruled, but the ruling has not been stated as a reason for a new trial.)

The evidence shows that this transaction was had under the rules and regulations of the Chicago Board of Trade, and appellees in their brief admit that section 5 of rule 24 reads as follows :

“Should any party, called upon as herein provided for, fail to deposit the security or margins called for within the next banking hour thereafter, the party making such call shall have the right, if he be the seller, to re-sell the property for account of the delinquent, such re-sale to be for the same delivery as was named in the original contract ; if it be the buyer, he shall have the right to re-purchase the property for account of the delinquent, deliverable at the time named in the original purchase ; in either case he shall at once communicate to the delinquent the action he elected to take, and all losses or damages on such defaulted contracts shall be at once due and payable, the same as though said contracts had fully matured.”

By another clause of the rules and regulations of said Board of Trade, the settlement of all contracts should be considered as a sale and purchase.

The regulations also provide for settlements between members of the Board of Trade by offsets, cancellations and substitutions. Under which rules and regulations the books are so kept as to show regular transfers of the property, whether there was any actual transfer by sale and delivery or not ; and it is beyond controversy that a large per cent. of these transactions are settled upon the basis of the difference in prices, without the payment of a cent on the purchase-price, or the delivery of a particle of the commodity said to be purchased. The participators, denominated “ bulls and bears,” with their “ puts and calls,” run prices up and down, and form what are called “ corners ” in the trade, then force settlements whether the contracts have matured or not. And under their cunningly devised system of offsets, cancellations and substitu-

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tions, they are enabled to square up their dealings among themselves and procure a settlement of the differences by absorbing the margins paid in, and requiring outside customers to foot up losses, the manipulators thereby amassing large and princely fortunes, while reducing to bankruptcy and ruin a large and meritorious class of customers, who have been unwittingly duped into their folds, under the seductive influences of trying to get money without earning it. Such transactions are not only gaming, illegal and void, but they are a cheat, a swindle and a fraud upon the legitimate trade and commerce of the country.

While honest trade and commerce, in a legitimate way, in all commodities, should be rigidly upheld as the great lever of individual and national prosperity, fictitious, illegitimate and illegal trading, not based upon values paid out and received, should be discouraged and prevented in every legitimate way possible.

It is evident from the evidence in the case under consideration, that appellant's understanding and intention was only to engage in a speculation on prices. The small nibble that he had previously made at the hook only induced him to bite again, with a hope of getting a larger bait. But the evidence is very meagre as to the surroundings of the appellant; it does not show his business or occupation; whether he was a miller and wanted to purchase wheat for manufacturing purposes, or a shipper and wanted the wheat for transfer and legitimate commerce, or whether he was a mere adventurer guessing upon prices, and willing to risk his money upon the hazard, without any ability to pay the contract price, is not developed in the evidence. Nor does it appear from the evidence that the appellees were interested in, knew anything about, or made any inquiry in relation to, appellant's ability to pay for the wheat. The only thing they required was the putting up of sufficient margins to cover shrinkage in prices, and the only inquiry they made was as

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to the appellant's ability to pay losses. To secure the decline in prices was all they appeared to care for. But notwithstanding these circumstances, tending to show a mutual understanding between the parties that the wheat was not to be paid for or delivered, in the rebutting evidence, Mr. Fesler testified that the wheat would have been delivered at the maturity of the contract if the margins had been kept good to that time.

Mr. Lee Hunt, one of the plaintiffs, also testified that at the time of the sale there was no intention that the wheat should not be delivered at the maturity of the contract, if the margins were kept good; and if this had been done the wheat would have been delivered to the defendant at the maturity of the contract; that, according to the books of the Chicago Board of Trade, this wheat was delivered to the subsequent purchaser upon the original contract at its maturity. According to the well known practice, under the rules and regulations of the Chicago Board of Trade, the fact that the books showed a delivery of the wheat, if legitimate testimony for any purpose, furnished but very slight evidence of an actual delivery of the wheat. Still this rebutting evidence clearly tends to show that the intention not to deliver the wheat, at the maturity of the contract, was not mutual. And if either party contracts in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other. *Rumsey v. Berry*, 65 Maine, 570; *Williams v. Carr*, 80 N. C. 294; *Gregory v. Wendell*, 39 Mich. 337.

The burden of the defence rests upon the defendant. *Wright v. Crabbs*, 78 Ind. 487; *Parker v. Hubble*, 75 Ind. 580.

The jury must have confided in the rebutting testimony, or they could not have found for the plaintiffs. The intention of the parties was a question to be decided by the jury, and when their decision has been approved by the court, who heard all the evidence, in refusing to grant a new trial, it matters not what we may think of the merits of the weight of the ev-

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idence. A well established rule of decision of this court, in such cases, prevents any interference with the verdict of the jury.

There is no available error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Sept. 18, 1884.

No. 11,187.

97	211
126	458

FITCH ET AL. 'v. CITIZENS NATIONAL BANK OF GREENSBURGH.

PROMISSORY NOTE.—*Condition.*—*Interest.*—*Attorney's Fees.*—A promissory note conditioned that interest shall be compounded if not paid at maturity, and stipulating that five per cent. attorney's fees shall be paid, does not make the payment of attorney's fees conditional.

SAME.—*Endorser.*—*Surety.*—*Notice of Non-Payment.*—One who endorses a note as surety for the maker is not entitled to notice of non-payment.

SAME.—*Waiver of Notice.*—Where a note payable at bank contains a waiver by the endorser of notice of protest for non-payment, notice of non-payment is waived by the endorser.

PRACTICE.—*Answer to Interrogatories.*—The court may, under the code, strike out the defendant's answer if he fail to answer interrogatories as ordered, in the absence of a sufficient excuse shown.

SAME.—*Time of Trial.*—Where it appears from the whole record that there was no meritorious defence, there is no available error in the trial of the cause before the day set for its trial.

From the Dearborn Circuit Court.

J. D. Haynes, J. K. Thompson, W. S. Holman and W. S. Holman, Jr., for appellants.

W. A. Moore and J. O. Marshall, for appellee.

ZOLLARS, J.—A note was declared upon by appellee, as having been executed by one and endorsed by the other of appellants. At the trial the only evidence was the note and the endorsement thereon, and the agreement that the apparent

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endorser was, in fact, a surety. Judgment was rendered in favor of appellee, against appellants, the one as principal and the other as surety, for the amount due upon the note, including \$100 as attorney fees.

The contention of appellants is, that the attorney fees should not have been allowed, because the stipulation in the note was conditional; and that the finding and judgment of the trial court is not sustained by sufficient evidence, as there was no proof of notice of the non-payment of the note. The note is in the ordinary form of a note payable at a bank. That portion upon which appellants base their argument is as follows: "With eight per cent. interest from date, payable annually, compounded if not paid when due. Five per cent. attorney fees. Extension of time after maturity, with or without consideration, will not release sureties on this note. The drawers and endorsers severally waive presentation for payment, protest, and notice of protest, of the non-payment of this note. HENRY FITCH."

It was endorsed "D. W. C. Fitch."

The promise to pay attorney fees is without any condition. The condition in relation to compounding the interest does not apply to it. There was, therefore, no error in allowing the five per cent. attorney fees.

The objection that there was no proof of the non-payment of the note is not available for at least two reasons. In the first place, we think that the waiver in the note clearly includes notice of non-payment. The purpose of a protest, and notice of it, is to bind the endorser, by thus giving him notice that the paper has been dishonored by the maker. When these are waived, notice of non-payment is waived. It is very evident that the contracting parties in the case before us intended to waive each and everything usually necessary to bind the endorser. There was, therefore, no need of proof of notice of non-payment. *Gordon v. Montgomery*, 19 Ind. 110; *Neal v. Wood*, 23 Ind. 523.

In the second place, as this case was disposed of upon the

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agreement of the parties, there was no endorser to be notified. The apparent endorser was adjudged to be a surety. As to the principal and surety upon a note, no notice of non-payment is necessary; they are bound to take notice. *Gordon v. Montgomery, supra*; *Scott v. Shirk*, 60 Ind. 160.

The cause was commenced on the 23d day of August, 1883. On the 7th day of the September term, 1883, appellants filed an answer of general denial and payment. One of them filed a cross complaint, setting up suretyship. Appellee filed a reply, admitting the suretyship, and also a general denial of the plea of payment, and with it, an interrogatory. The court made an order that the interrogatory should be answered by noon of the following day, being the eighth day of the term. One of the appellants, with one of their counsel, looked for the papers with the purpose of making answer to the interrogatory, but did not find them, although they were on file all the while. If the papers had been found, the answer would have been made.

At three o'clock on the eighth day, the court, on motion of appellee, "closed the rule," and struck out the answer of payment, because of the failure to answer the interrogatory within the time fixed. Previous to that time, the case had been set for trial on the twelfth day of the term. Appellants' counsel objected to the striking out of the answer, and stated that if time should be given until the next call of the case the interrogatory would be answered, and that the trial would not thereby be delayed beyond the twelfth day of the term, on which day the case had been set for trial. After the answer was struck out, appellee demanded an immediate trial of the cause. Appellants' counsel objected to the trial, and asked for a short delay to call in appellants, who were about their business in the town where the court was sitting, to make a showing for delay. This the court refused unless appellants' counsel would state professionally, that appellants had a valid defence to the note. Upon saying that they could not make such a statement, because they had not the

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necessary information, the case was tried without further delay. Because of this action of the court, we are asked to reverse the judgment.

The interrogatory was directed to the question of payment set up in the second answer. The rule to answer the interrogatory was not complied with, nor was a sufficient excuse offered for the failure. If payments had been made upon the note, it would have been an easy matter to answer the interrogatory. For such an answer the time given was more than ample. No effort was made to comply with the rule until a few hours before the expiration of the time given. The search for the papers could not have been very thorough, as they were on file, and doubtless, upon inquiry of the clerk, would have been produced. It was the duty of appellants to have been in court to comply with the rule, or furnish some valid excuse for not doing so. Courts can not extend rules, or suspend business, for the convenience of litigants who may choose to absent themselves from the court-house to attend to other matters. In this case, no kind of excuse is offered for the absence of appellants. It is manifest that they paid but little regard to the order of the court. This is manifest from the record before us. It may have been more manifest to the court below. The statute provides that the court may enforce such orders by attachment or otherwise. Section 359, R. S. 1881.

The court, without doubt, had authority to strike out the answer upon failure to answer the interrogatory. Bicknell Pr. 122. The court may strike out an answer when shown to be a sham by the answers to interrogatories. Section 382, R. S. 1881. But it does not follow from this that it may not strike out such answer upon failure to answer interrogatories.

The record does not show by whom the cause was set for trial upon the 12th day of the term. In argument counsel speak of it as having been set by the clerk. If, in fact, it was so set, it was without authority, and the court was not

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bound by it. The code of 1852 provided that the clerk might set cases for trial. Section 359, 2 R. S. 1876, p. 184. But there is no provision of that kind in the code of 1881. This latter code has two provisions upon the subject of the order of trials. Section 518 provides that the trial in each action shall be in the order in which it stands upon the docket, unless the court, for good cause shown, shall direct otherwise. This is the same as section 321, code of 1852. 2 R. S. 1876, p. 164. The holding under that section has been that the court has some discretion in the matter of taking up causes, and that this court will presume, the contrary not appearing, that good ground for the action of the court existed. *French v. Howard*, 14 Ind. 455.

In the case before us, however, it is not shown that the case was tried out of its order, as it stood to other cases upon the docket. For aught that appears, every case preceding it, if there were any, had been tried and fully disposed of. Section 360, code of 1852, which followed the section in relation to the setting of cases by the clerk, provided that the trial of issues of fact should be on or after the day on which the cause was set on the docket, unless otherwise agreed by the parties. This was carried into the code of 1881 as section 403. As to all cases set for a day by the court, it is applicable. It is applicable to the case before us, if we assume that the case was set by the court. Upon such an assumption, the action of the court in trying the cause at the time it was tried, not only without the agreement of the parties, but over the objection of appellants, was irregular and erroneous. Cases may arise in which such an error will be so serious in its consequences as to require the reversal of the judgments. When a case is set for trial by the court for a particular day, the parties have the right to rely upon it, and subpoena their witnesses for that day. To force a trial at an earlier day may be to deprive a party of the benefit of witnesses, and thus defeat his cause of action or defence.

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The case before us, however, does not appear to be such a case. So far as shown by the record, the error, assuming that the case was set by the court, and that, therefore, there was error, was a harmless one. At no time, and in no manner, was it claimed in the court below that appellants had any defence to the note. Not only was no such showing made by appellants in any effort to set aside the judgment, or for a new trial, but their counsel would not take the responsibility of stating that there was such defence in order to save the answer and get a continuance of the cause. If appellants had any defence, it is very remarkable that their counsel, who prepared and filed the answer and cross complaint, were not made acquainted with it. The whole course of appellants shows, very conclusively, that they have no defence to the note, and that their only ground of complaint is the rendition of the judgment four days earlier than they thought they had a right to expect.

This is not such an error as would justify this court in a reversal of the judgment. Sections 398 and 658, R. S. 1881; *Payne v. June*, 92 Ind. 252; *Rawson v. Pratt*, 91 Ind. 9; *Burgett v. Teal*, 91 Ind. 260.

These cases do not involve the exact question here presented, but they, and many like cases that might be cited, settle the rule for the government of this court.

If it were in any way shown that appellants have any defence to the note, we should have a different case. It might then appear that they were injured by the action of the court below. Without such a showing, this court should not overthrow judgments and prolong litigation in cases of this character. *Telford v. Wilson*, 71 Ind. 555.

The judgment is affirmed, with costs.

Filed Sept. 24, 1884.

 Travellers Insurance Company v. Noland et al.

No. 10,739.

TRAVELLERS INSURANCE COMPANY v. NOLAND ET AL.

97	217
139	10
97	217
153	153

DEED.—Construction.—Married Woman.—A deed of lands executed by husband and wife, made after dower was abolished, which contained a valid grant in fee of the husband's lands by him, and in the *testatum* clause words whereby his wife "relinquishes her dower in said premises," is sufficient to bar the wife's inchoate estate in the lands which would otherwise have become consummate upon his death. •

PLEADING.—Demurrer.—Practice.—Evidence.—Harmless Error.—Where a demurrer is sustained erroneously to a complaint in a single paragraph, stating the facts specifically, and afterwards another paragraph more general is filed upon which there is issue, and upon the trial of which the facts stated in the original would have been admissible in evidence, the error can not be held harmless, it being presumed, nothing appearing to the contrary, that the case was tried upon the erroneous theory of law as held in sustaining the demurrer.

From the Madison Circuit Court.

F. H. Levering, H. D. Thompson, T. B. Orr, D. V. Burns and *C. S. Denny*, for appellant.

J. W. Sansberry, M. A. Chipman and *J. W. Sansberry, Jr.*, for appellees.

HAMMOND, J.—Action by the appellees against the appellant for partition of real estate. The complaint alleges that the appellees own the undivided one-third, and the appellant the remaining two-thirds, of the land. Answer: 1. The general denial. 2. The twenty years' statute of limitation. Reply in denial of the second paragraph of answer.

The appellant also filed a cross complaint in one paragraph to quiet its title to all the real estate in controversy. In this cross complaint, the appellant specifically stated the facts upon which its claim of title was based. The appellees demurred to the cross complaint for want of facts, which demurrer was sustained and the appellant excepted. Appellant then filed a second paragraph of cross complaint, alleging generally that it was the owner and in possession of the real estate, describing it; that the appellees claimed some

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interest therein which was a cloud upon appellant's title, and asking to have its title quieted. To this the appellees answered in denial. Trial by jury; verdict for appellees; judgment on verdict, over appellant's motion for a new trial and exceptions. The evidence is not in the record.

The appellant has assigned a number of errors, but in the condition of the record we can only consider that relating to the sustaining of the demurrer to the first paragraph of the cross complaint.

The facts stated in the first paragraph of the cross complaint are substantially as follows: One James French, in 1848, derived title to all the land in controversy by patent from the United States. On December 13th, 1854, French and his wife conveyed the land to their daughter, Elizabeth Sebrell. This conveyance, omitting description of the land, was as follows:

"This conveyance witnesseth, that James French of Madison county, Indiana, in consideration of natural love and affection which he bears to his daughter, Elizabeth Sebrell, and as an advancement of one thousand dollars to said Elizabeth Sebrell, of Madison county, and State of Indiana, does hereby grant, bargain, sell and convey to said Elizabeth Sebrell and her heirs, and to Benjamin Sebrell, his lifetime, and assigns forever, the following real estate in Madison county, and State of Indiana, and described as follows, to wit:" (description) "together with all the privileges and appurtenances to the same belonging, to have and to hold the same to the said Elizabeth Sebrell, her heirs and assigns forever; the grantors, their heirs and assigns hereby covenanting with the grantee, his heirs and assigns, that the title so conveyed is clear from, and unincumbered, that they are lawfully seized of the premises aforesaid, as a sure, perfect and indefeasible estate of inheritance in fee simple, and that they will warrant and defend the same against all claims whatever.

"In witness whereof the said James French and Elizabeth French, his wife, who hereby relinquishes her dower in

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said premises, have hereunto set their hands and seals, this 13th day of December, 1854.

“(Signed) JAMES FRENCH. [SEAL]
“ ELIZABETH FRENCH. [SEAL] ”

The deed was duly acknowledged and recorded. Elizabeth Sebrell and her husband went into immediate possession of the land under the deed. In 1877, while still in such possession, they executed a mortgage upon the real estate to the appellant. This mortgage having been foreclosed and the land sold to the appellant at sheriff's sale under the foreclosure, a sheriff's deed was executed to the appellant on February 19th, 1881.

James French died in 1856. His widow, on March 4th, 1880, made a deed for the land to the appellees, who have no claim of title except under this deed. They claim by virtue of such deed to own the undivided one-third of the land. After her husband's death, up to the time of making the deed to the appellees, French's widow never claimed any interest in the land.

It is insisted by the appellees that the deed from French and wife to Elizabeth Sebrell was not sufficient to convey the wife's inchoate interest in her husband's land, nor to bar her claim for one-third thereof after his death.

The objection made to the conveyance is that the wife's name does not appear in the first or granting part of the deed. As supporting the proposition that the wife's signature to the deed did not bar her interest in the land after the death of her husband, we are referred to *Cox v. Wells*, 7 Blackf. 410 (43 Am. Dec. 98), and *Davis v. Bartholomew*, 3 Ind. 485.

In the case first cited, the deed was signed by the husband and wife, but her name nowhere appears in the deed except in the conclusion, as follows: “In testimony whereof, the said James Conwell and Wineford Conwell his wife, have hereunto set their hands and seals this 5th of September, 1840.” BLACKFORD, J., who delivered the opinion of the court, said: “The deed offered in evidence by the plaintiff,

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and shown on *oyer*, does not convey the interest of Conwell's wife in the premises; her name not being inserted in the body of the deed."

Davis v. Bartholomew, supra, is authority against the appellees. In that case there were two deeds, and it is true that one of them was held insufficient to bar the widow's dower. But in the other, which was executed by Jeremiah Bartholomew and his wife to James Davis, and of which, except as to names, date, and the description of land, the deed now under consideration is substantially a copy, it was held that the wife's dower was released. The opinion in that case was also delivered by BLACKFORD, J., who said: "The first question is, whether the complainant's claim to dower was affected by the deed which she and her husband executed to Davis. The only words in that deed bearing on the question are the following: 'In witness whereof the said Jeremiah Bartholomew and Rebecca, his wife, who hereby relinquishes her right of dower in the above premises, have hereunto set their hands, date above written.' * * There can be no doubt, we think, but that the above quoted words amount to a release of dower."

The words in the concluding part of the deed above referred to, and which the court held were sufficient to release dower, occur almost *verbatim* in the deed under consideration from French and wife to Elizabeth Sebrell.

- It will be observed that in the case in 7 Blackf. there is nothing in the body of the deed indicating an intention upon the part of the wife to release her right of dower. But in the present case, as in that in 3 Ind., this intention clearly appears in the concluding part of the deed.

The deed from French and wife to their daughter, made after dower was abolished, uses inappropriate words to effect the wife's release of her inchoate interest. But her intention to release such interest is manifest. The word "dower" should be given the meaning plainly intended by the parties to effectuate the object of the conveyance. *Ostrander v. Spickard*, 8 Blackf. 227; *Johnson v. Rockwell*, 12 Ind. 76.

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Our conclusion is that the deed from French and wife to Mrs. Sebrell was sufficient to bar Mrs. French's claim of title after her husband's death. It follows that her deed to the appellees conveyed no title. We hold, therefore, that the first paragraph of the appellant's cross complaint was good, and that the court erred in sustaining the demurrer thereto. It is insisted, however, by the appellees, that the error was harmless, as the facts stated in the first might have been proved under the second paragraph of the cross complaint.

It may be true that proof of the facts alleged in the first were admissible under the second paragraph of the cross complaint, and yet we are not able to say that there was no error in sustaining the demurrer to the first paragraph. In the first paragraph, as we have seen, the appellant stated the facts specifically upon which it relied for title. In the second paragraph, it merely made the general averment that it was the owner of the land. Had both paragraphs been the same, either in setting up generally, or by special statement of facts, the appellant's claim of title, or had both paragraphs been pleaded at the same time, we might say that the sustaining of a demurrer to either paragraph was harmless. But the demurrer was sustained to the first before the second paragraph was filed. The first paragraph advised the court fully of the facts relied upon by the appellant to establish title. The second paragraph gave the court no such information. The demurrer having been sustained to the first, before the filing of the second paragraph, it is obvious that the ruling was made upon the theory that the first paragraph did not state facts sufficient to constitute a cause of action. The sustaining of the demurrer upon that account was erroneous. As this incorrect view of the law probably controlled the subsequent proceedings of the case, we are of the opinion that the ruling can not be upheld as being harmless. As was observed in *Wheeler v. Me-shing-go-me-sia*, 30 Ind. 402, "It must be held, nothing appearing to the contrary, that the court below tried

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the case on the theory of the law as ruled on the demurrers in making up the issues."

Judgment reversed, at appellees' costs, with instructions to the court below to overrule the appellees' demurrer to the first paragraph of the appellant's cross complaint, and for further proceedings in accordance with this opinion.

Filed May 6, 1884. Petition for a rehearing overruled Nov. 12, 1884.

No. 10,823.

RUCKER v. STEELMAN.

97	222
157	441

RES ADJUDICATA.—Evidence.—Former Recovery.—Judgment.—A record of a former suit between the same parties for the same property is competent evidence. That in the former action additional property was involved does not affect the conclusiveness of the judgment upon the property involved in the suit on trial.

SUPREME COURT.—Evidence.—Exception.—A party, claiming a reversal because of the exclusion of evidence, must show what the evidence was, that the question of its competency and materiality may be determined.

ADVERSE POSSESSION.—Execution Defendant.—Conveyance.—The possession of an execution defendant is not an adverse possession within the rule prohibiting the execution of deeds by the owner out of possession.

SAME.—Contract of Purchase.—Performance.—Where possession of land is taken under an agreement, express or implied, acknowledging the title of the owner, it is not adverse. In an executory contract to purchase, the possession is not adverse, while the conditions or covenants remain unperformed.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellant.

M. C. Hester, for appellee.

ELLIOTT, C. J.—The questions in this case arise on the ruling denying the appellant a new trial.

The court permitted the appellee to give in evidence the record of the proceedings in a former action between the parties, and of this ruling complaint is made, but clearly without just reason. A record of a former suit between the same parties for the same property is competent evidence, and

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in this instance the parties were the same and the property in controversy the same in both actions. In the former action the controversy included more property than that here the subject of controversy, but this does not affect the question of the conclusiveness of the former judgment upon the property involved in this action.

It is not shown that it was error to refuse to permit the appellant to read in evidence depositions taken in the former case. The depositions are not incorporated into the record of this case, and we can not, therefore, determine whether there was or was not material error in excluding them. A long settled rule requires that the party claiming a reversal on the ground that competent evidence has been excluded must show what the evidence was, in order that the court may determine its materiality and competency.

The possession of an execution defendant is not an adverse possession within the meaning of the rule prohibiting the execution of deeds by the owner out of possession.

Where possession of land is taken under an agreement, express or implied, acknowledging the title of the owner, it is not adverse. Possession taken under an executory contract of purchase does not become adverse as long, at least, as the conditions or covenants of the contract remain unperformed. *Clouse v. Elliott*, 71 Ind. 302; *Cole v. Wright*, 70 Ind. 179. Judgment affirmed.

Filed May 10, 1884. Petition for a rehearing overruled Nov. 12, 1884.

No. 10,526.

FLETCHER v. WURGLER ET AL.

JUDGMENT.—*Part Payment.*—*Agreement.*—*Consideration.*—*Accord and Satisfaction.*—The payment by A. of a part of a judgment against himself and others, upon an agreement of the plaintiff to hold A. harmless as against the judgment, is not an accord and satisfaction by A., and will not relieve him as against the whole judgment.

From the Marion Circuit Court.

97	223
136	408
97	223
136	597

Fletcher v. Wurgler *et al.*

A. C. Harris, for appellant.

D. V. Burns, C. S. Denny, J. R. Wilson and J. L. Wilson, for appellees.

MORRIS, C.—The appellant commenced proceedings against the appellees to revive a judgment obtained by him against the appellees Wurgler and Mettler and another, on the 14th day of November, 1867, for \$387.67, and to reach certain property alleged to be in the possession of the appellees Fletcher and Churchman, belonging to the appellee Wurgler.

Wurgler and Mettler answered the complaint separately. It will not be necessary to notice but one of the answers, as we regard them as presenting the same question.

The third paragraph of the answer of Wurgler presents the facts upon which the whole contention between the parties rests. It is, in substance, as follows:

The defendant admits that a judgment was rendered against him and his co-defendants, as stated in the complaint. But he says that long after the rendition thereof, on the 6th day of May, 1871, while said judgment was unpaid, and while a proceeding was pending by the plaintiff against this defendant and his wife to subject certain property claimed by his wife (who was not a party to said judgment) to the payment of the same, and before any trial of said last named action was had, the plaintiff and this defendant entered into a written contract, whereby it was agreed by the plaintiff that if this defendant would pay to him the sum of \$150, he would receive the same in full payment and satisfaction, and would hold this defendant harmless from said judgment; that the defendant thereupon paid to the plaintiff said sum of \$150, and joined with this plaintiff in the execution of said contract, which was thereupon delivered to him, a copy of which is filed with this paragraph of the answer; that the cause then pending against him and his said wife was dismissed by this plaintiff, and no demand or claim was ever made by said plaintiff against this defendant on account of said judgment

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until the commencement of this suit. Whereupon the defendant demands judgment.

The writing referred to is as follows:

"Being mutually desirous of settling the matters now in controversy between us, to the end that all litigation be avoided, it is hereby agreed that the said G. A. Wurgler is to pay said Thomas A. Fletcher the sum of one hundred and fifty dollars in full of all judgments, claims, and demands in favor of said Fletcher vs. said Wurgler, up to date; and the said Fletcher agrees to hold the said Wurgler harmless from all of said judgments, claims or liens as to said Fletcher or his assignees, and the said Fletcher hereby acknowledges the receipt of said sum of \$150.

G. ADOLPH WURGLER.

"May 6th, 1871.

THOMAS S. FLETCHER.

"By DYE and HARRIS, his Attorneys."

The appellant demurred to this answer, as he did to the fourth paragraph of Wurgler's answer, which was, in substance, the same as the third. He also demurred to the third and fourth of the answer of Mettler, which were, in legal effect, the same as the third and fourth paragraphs of Wurgler's answer. The court overruled the demurrers to the answers. The appellant then replied to the answers, and the cause was submitted to the court for trial. Upon the request of the appellant, the court found the facts specially and stated its conclusions of law thereon, to which the appellant excepted. The finding was in favor of the appellees, for whom judgment was rendered.

The errors assigned bring in question the conclusions of law stated by the court and its rulings upon the several demurrers to the answers of Wurgler and Mettler.

It seems to be the settled law that where a debt is due, the receipt of a sum less than the whole debt, upon an agreement that the sum received shall operate as a discharge of the whole debt, is not a good accord and satisfaction, and can not be pleaded in bar of a suit brought to recover the balance of

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the debt. *Fitzgerald v. Smith*, 1 Ind. 310; *Bateman v. Daniels*, 5 Blackf. 71; *Stone v. Lewman*, 28 Ind. 97; *Smith v. Tyler*, 51 Ind. 512.

The ground upon which this rule of law, which is not particularly favored by the courts, rests, is that such an agreement is without consideration. The receipt of less than the whole debt, if due, is no benefit to the creditor in a legal sense, for he was entitled to it; its payment could not legally prejudice or injure the debtor, for he owed the sum paid, and it was his duty to pay it. But where there is any additional consideration, however small, courts will uphold such agreements. As, if the debt is not due, though it has but a day in which to mature, the receipt of a sum less than the whole debt, will be held to be valid; and so if the sum is to be paid in commercial paper. *Wells v. Morrison*, 91 Ind. 51.

The question in the case before us then is, was there any other consideration for the contract relied upon as a bar than the \$150 alleged to have been received by the appellant in full satisfaction of said judgment? If there was, the court did not err in overruling the demurrers to the several paragraphs of the answer; if there was no such additional consideration, the demurrers should have been sustained.

The appellees say there was a suit pending in favor of the appellant against Wurgler and wife, which, by the terms of the agreement, was to be, and in fact was, dismissed by the appellant. This is not strictly true in point of fact. There is nothing in the alleged agreement about the pending suit or its dismissal. Its dismissal by the appellant was, doubtless, the result of the agreement. But the dismissal of the pending suit by the appellant could not constitute any part of the consideration for his promise to receive the \$150 in full satisfaction of the judgment now sought to be enforced. Such consideration must have proceeded from Wurgler, not from the appellant. It is further said that the parties, by the terms of the contract, expressed their mutual desire to avoid all litigation. This is true, and commendable enough, and for this

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reason, no doubt, the appellant agreed to accept \$150 in full satisfaction of a judgment for more than double that amount. The desire of the parties to avoid trouble and contention is generally the main inducement to contracts like that in question, but such desire is not recognized as constituting a legal consideration for such agreements.

It is also said that costs had accumulated in the suit then pending between the appellant and Wurgler and wife. This may be, but there is nothing in the agreement as to who should pay such costs. It is not alluded to in the written receipt or contract, nor in the answer, as constituting any part of the consideration for the promise of the appellant to receive the \$150 in full satisfaction of said judgment. If, as a part of the consideration for the appellant's promise, Wurgler agreed to pay said costs, or any part of them, it should have been stated in the answer.

It is further said that the appellant agreed to save Wurgler from the payment of said judgment. But such a promise made by the appellant to the appellee Wurgler could hardly be claimed to constitute a good consideration for the promise so made. *Smith v. Tyler, supra.*

It is said by counsel that Wurgler was not a sole debtor, and that "the law is well settled that a creditor may receive a proportionate part from one of several debtors, and that a release to him is founded upon a good consideration, though payment of the whole debt was not made.

In support of this statement, counsel refer to 1 Parsons Contracts, p. 28; *Milliken v. Brown*, 1 Rawle, 391; *Russell v. Adderton*, 64 N. C. 417.

In the first of the above cases, the facts were quite different from the facts in this case, and the question was decided by a divided court. TOD, J., dissented.

In the case decided by the North Carolina court, what was claimed to be a release, contained this clause: "It being understood that this agreement is in no way to affect the liability of the other principals." The agreement was also un-

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der seal. As it appeared not to have been the intention of the parties to release others who were liable, the court construed the instrument as a covenant not to sue, which enabled the court to give effect to the release without in any way impairing the rights of the creditor against the other joint debtors. No such construction can be given to the contract before us. There is nothing in the contract to justify it.

We do not understand Parsons as supporting the position assumed by the appellees.

The contrary of the above proposition is held in many cases. *Smith v. Bartholomew*, 1 Met. 276; *Harrison v. Close*, 2 Johns. 448; *Warren v. Skinner*, 20 Conn. 559.

In the case of *Smith v. Tyler*, *supra*, the plaintiff and others were the joint judgment debtors of Smith. Smith agreed with the plaintiff, Tyler, that if he would pay one-half of the judgment, he would look to White, one of the judgment debtors, and his property, for the other half of the judgment, and brought suit to enforce the agreement. His complaint was held bad upon demurrer. The court says: "There was no consideration for the promise or assurance of Smith that he would make half of the amount of his judgment out of the real estate of White and would demand only one-half of the amount of the plaintiff. When a debt is due and not controverted, the payment by the debtor of a part of it is no consideration for a release, or an agreement to release the whole debt."

The above case bears directly upon all of the questions in this case, and is, we think, in accordance with the weight of authority upon the subject.

The court below erred in overruling the demurrers to the third and fourth paragraphs of the answer of Wurgler, and also in overruling the demurrers to the third and fourth paragraphs of the answer of Mettler. As for these errors the judgment must be reversed, it is not necessary to examine the other questions discussed.

PER CURIAM.—It is ordered, upon the foregoing opinion,

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that the judgment below be reversed, with instructions to sustain the appellant's demurrers to the third and fourth paragraphs of the answers of the appellees Wurgler and Mettler, at the cost of the appellees.

Filed Oct. 19, 1883. Petition for a rehearing overruled Nov. 13, 1884.

 No. 9320.

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97	229
183	229
97	229
144	301
97	229
153	21

JUDGMENT.—*Review of.*—*New Matter.*—*Diligence.*—A review of a judgment for new matter discovered since its rendition will not be granted if by proper diligence such matter could have been ascertained before the trial, nor where such matter is not material.

SAME.—*Complaint.*—In such case the complaint should show by facts averred the diligence used.

SAME.—*Jurisdiction.*—*Waiver.*—Whether new matter available only in support of a plea to the jurisdiction as to the defendant's person would be sufficient, *quære?* but in any event it would not be if other facts equally available for the same purpose were known, and no question was made as to the jurisdiction, and there was a waiver of all.

PROMISSORY NOTE.—*Assignor and Assignee.*—*Consideration.*—*Forged Note.*—In a suit upon a note payable in bank brought by an assignee in good faith before maturity, the fact that the consideration of the note was the assignment by the payee to the maker of a forged note, is no defence.

From the Superior Court of Marion County.

J. Hanna, F. Knefler and J. S. Berryhill, for appellants.

B. F. Love, A. Major, H. C. Morrison and O. J. Glessner, for appellees.

HAMMOND, J.—The appellant McCauley, on December 4th, 1872, filed his complaint in the court below against the appellees, as makers, and the appellant Lewis, as endorser, of four promissory notes. It was alleged that the notes were payable to Lewis in a bank in this State, and were by him assigned by endorsement to McCauley for value before maturity. Issues were joined upon questions as to whether McCauley was the *bona fide* holder of the notes, and as to the

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appellees' set-off against the same on account of Lewis' indebtedness to them.

The case was tried by the court on November 13th, 1873, and at the request of the defendants, the appellees herein, the court made a special finding of the facts, stating its conclusions of law thereon. The facts thus found and the conclusions of law were stated by the court as follows:

"The court finds the notes sued on were executed at their date, and for a valuable consideration; that they were all payable at the First National Bank of Shelbyville; that said bank is a bank in the State of Indiana; that said notes were assigned absolutely by the payee to the plaintiff for a valuable consideration before due, and without notice to the assignee of any defence whatever; that they have not been paid to the plaintiff, and that there is now due on said notes \$2,465.50. On the above facts, the court finds as conclusions of law that the plaintiff has a right to recover the above sum without relief, and directs judgment to be entered accordingly."

The appellees took no exceptions to the conclusions of law, and made no motion for a new trial. Judgment was rendered in accordance with the special findings and conclusions.

The present action was commenced by the appellees against McCauley and Lewis on September 6th, 1876. The appellants Hanna and Knefler were subsequently, by supplemental complaint, made parties defendants. The object of this action was to review the proceedings and judgment above mentioned on account of material new matter discovered since the rendition of said judgment. The appellee Murdock, as shown by the averments in the appellees' complaint, had redeemed certain real estate of his, which had been sold at sheriff's sale to McCauley under his said judgment against the appellees, and the money for such redemption, after the commencement of this action, was paid by the clerk to the appellants Hanna and Knefler, who were McCauley's attorneys. The object in making said attorneys parties defendants by supplemental complaint to the appellees' bill for review,

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was to enjoin them from paying said money to McCauley. Upon the issues joined in the present case there was a trial by jury, resulting in a verdict for the appellees. The appellants McCauley and Lewis, at the proper time, made separate motions for a new trial and in arrest of judgment, which were overruled. An order was then made directing McCauley and his attorneys, Hanna and Knefler, to pay into court for the appellees the money received from the clerk in redemption of Murdock's land. To this order proper exceptions were taken. A decree was then rendered on the verdict, vacating McCauley's judgment as to the appellees. On appeal by the appellants to the general term of the court below, the judgment of the special term was affirmed, and from that decision the appellants have brought the case to this court.

It is insisted by the appellants that the complaint does not state sufficient facts to constitute a cause of action, and that their motion in arrest of judgment should have been sustained.

The appellees, in their complaint for review, do not claim that there were any errors of law appearing in the proceedings and judgment sought to be reviewed. They rely solely upon material new matter discovered since the rendition of the judgment, basing their action upon sections 615-620, R. S. 1881. The new matter relied upon by the appellees consists of two alleged defences to McCauley's action, which are claimed to have been discovered since the rendition of his judgment. The first of these defences relates to a partial want or failure of consideration of the notes upon which the judgment was rendered. The second defence, had it been known to the appellees in time, would have been used by them, as they claim, to defeat the jurisdiction of the court as to their persons, thereby causing an abatement of McCauley's action. Under the first cause for review, it is alleged that a part of the consideration of the notes executed by the appellees to Lewis, and upon which McCauley obtained his judgment, was the assignment by Lewis to appellees of a certain pretended promissory note, purporting to have been ex-

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ecuted to Lewis by one Jacob Scheibel. This note was for \$250, dated August 22d, 1871, and payable December 25th of the same year. It is averred that Scheibel did not execute this note, and that his name thereto was a forgery.

Under the second cause for review, it is charged that the appellees did not appear to McCauley's action until it was shown by the return of the sheriff of Marion county, that he had personally served summons upon Lewis in that county; that no such service was in fact made; that by McCauley's fraud, some one, whose name was unknown to the appellees, personated Lewis, and that the sheriff was procured to read the summons to that person, supposing that he was Lewis, and made return showing service upon Lewis; that Lewis was a non-resident of the State, and that the appellees resided in Shelby county, in this State; that if the appellees had known that Lewis was not served with process, they would have raised the question of jurisdiction as to themselves by answer, but, not knowing this, they entered full appearance and answered to the merits of the action.

We will first notice the second ground relied upon for the review of the judgment. It may be questioned whether the discovery of new matter, which, if it had been known, could only have been available by plea to the jurisdiction of the court as to the person of the defendant, is good for the purpose of review. Material new matter, the discovery of which after the rendition of a judgment authorizes its review, probably relates to new matter going to the merits of the action. But conceding, without deciding, that such new matter applies to a defence in abatement, as well as in bar of the action, it is quite clear that, from the facts stated, the appellees were not prevented from questioning the court's jurisdiction of their persons.

A defendant may waive jurisdiction to his person. If he fails to plead to the jurisdiction, but answers upon the merits, the judgment against him will be valid. Under the facts stated in the appellees' complaint, we think that if Lewis

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had been in fact served with process in Marion county, as shown by the sheriff's return, this did not give the court jurisdiction of the action as to the appellees. They did not reside in the county in which the action was brought. Lewis resided out of the State. Under the law then in force, if Lewis had resided in the State, the action might have been commenced in the county where he resided or in the county where the appellees lived. But, on account of his non-residence, the appellees could not be sued out of their county, though a separate action against Lewis might have been maintained in any county of the State, where he could have been personally served with process. Section 33, 2 R. S. 1876, p. 46, provided that in all cases except certain local actions, mentioned in preceding sections, "the action shall be commenced in the county where the defendants, or one of them, has his usual place of residence. Where there are several defendants residing in different counties, the action may be brought in any county where either defendant resides; * * * and in cases of non-residents, or persons having no permanent residence in the State, action may be commenced and process served in any county where they may be found." It is plain, we think, that while Lewis might be sued in Marion county, if found there, the suit in that county without the appellees' consent could not include them as parties defendants. None of the defendants resided in Marion county. Those residing in this State should therefore have been sued in the county of their residence. A personal action against a resident and a non-resident of the State must be commenced in the county, where the resident defendant has his domicile. *Boorum v. Ray*, 72 Ind. 151. Service of process in another county upon the non-resident does not authorize the commencement of an action there against the resident. It is obvious that the appellees had knowledge of such facts as would have enabled them successfully to dispute the court's jurisdiction of their persons. They did not choose to do this, but went to trial upon the merits of the case.

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Now, after judgment went against them, it would be encouraging needless litigation to permit a review of the judgment on account of the subsequent discovery of a jurisdictional fact, when, at the time, such facts existed within their knowledge as would have enabled them to defeat the action on account of the court's want of jurisdiction of their persons.

It also appears from the record, strongly against the appellees' claim for review upon the ground now under consideration, that the question of jurisdiction, though not urged, was considered by them as waived. A copy of the record of the case sought to be reviewed is filed with their complaint. In this occurs the following order book entry of January 25th, 1873:

"Comes now the plaintiff" (McCauley), "by Hanna and Knefler, his attorneys, and the defendants" (the appellees), "by Voss, Davis and Holman, their attorneys, and the said defendants now withdraw their answer heretofore filed and enter a full appearance to the plaintiff's action herein and waive the jurisdiction of the court over their persons, and the defendants are, upon plaintiff's motion, ruled to answer on or before the first day of the next March term of this court, to which time this cause is by agreement continued."

After this waiver, made with full knowledge of facts which would have enabled the appellees to defeat the jurisdiction of the court, it is now too late, we think, to complain of such jurisdiction. After the appellees waived jurisdiction, it was immaterial to them whether Lewis was served with process or not. It was not essential that he should be a party to the action. Suit could have been maintained against the appellees alone.

The remaining question is whether the discovery of the forgery of the Scheibel note, after the rendition of the judgment, furnishes sufficient cause for its review. The endorsement of that note to the appellees by Lewis constituted, as is alleged, part of the consideration of the notes executed by them to him. Upon these notes, which were payable at a bank in this State, McCauley, as endorsee, obtained the judg-

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ment sought to be reviewed. If the action on these notes had been brought by Lewis, the appellees could have defended to the amount of the Scheibel note on account of its invalidity. But such defence was not available against McCauley if it appeared that he was an endorsee for value before maturity, without notice of the defence.

In the case sought to be reviewed, the question of McCauley's right to maintain suit upon the notes free of defences existing as to Lewis, was presented by the appellees' answer and decided in McCauley's favor. The appellees' complaint alleges the discovery of no new matter upon this question. The fact, therefore, of the discovery of the forgery of the Scheibel note is not material as against McCauley.

The appellees' complaint is also insufficient for not showing diligence. At the time of the rendition of the McCauley judgment, the Scheibel note had been due nearly two years. It was assigned to the appellees before it was due. No reason is shown in the complaint why the appellees did not, or could not, by inquiry of Scheibel have discovered the forgery in time to have made it available as a defence at the former trial. In a complaint to review a judgment on account of new matter discovered since its rendition, it must be shown that the new matter could not have been discovered before judgment by reasonable diligence. Section 617, R. S. 1881. In such case, general averments of diligence in the complaint are not sufficient. The facts constituting the diligence must be stated. *Barnes v. Dewey*, 58 Ind. 418; *Collins v. Rose*, 59 Ind. 33; *Whitehall v. Crawford*, 67 Ind. 84; *Alexander v. Daugherty*, 69 Ind. 388; *Debolt v. Debolt*, 86 Ind. 521.

The appellees' complaint was insufficient, and the motion in arrest of judgment should have been sustained.

Reversed at appellees' costs, with instruction to sustain the motion in arrest of judgment.

ELLIOTT, J., did not participate in the decision of this case.

Filed May 7, 1884. Petition for a rehearing overruled Nov. 11, 1884.

Merritt v. Richey *et al.*

No. 11,407.

MERRITT v. RICHEY ET AL.

JUDGMENT.—*Execution.—Real Estate.—Rights of Subsequent Purchasers.—Equity.—Marshalling Assets.*—Where a judgment is a lien upon several parcels of land which are afterwards sold to various persons at different times, a court of equity will direct its sale in the inverse order of its alienation.

SAME.—*Payment.—When Extinguishment of Lien on Land First Purchased.*—Where an execution issued upon such judgment is levied upon one of the parcels subsequently sold, and the purchaser pays or purchases the judgment, the same must be deemed extinguished as against the prior purchaser if the land levied upon is of sufficient value to pay it.

SAME.—*Title.—Sheriff's Sale.*—The judgment being thus extinguished, such subsequent purchaser can not thereafter acquire title to the prior purchaser's land by purchase under an execution issued upon such judgment.

SAME.—*Decree.—Order of Sale.*—A sale of the prior purchaser's land can not stand when the subsequent purchaser has prevented the former from obtaining an order requiring the land subject to the judgment and subsequently sold to be first offered, by promising the first purchaser to bid off the land first liable to be sold.

SUPREME COURT.—*Practice.—Amended Complaint.—Record.—Assignment of Error.*—Where an amended complaint by the appellant is filed in the court below, no question can be raised in the Supreme Court as to whether or not it is properly a part of the record, unless a motion was made to strike it out, the grounds therefor being stated, and such ruling assigned as a cross error.

From the Clinton Circuit Court.

J. V. Kent and O. E. Brumbaugh, for appellant.

J. N. Sims, for appellees.

BEST, C.—The appellant brought this action against the appellees to set aside a sheriff's sale of his property.

A demurrer by James M. Richey was sustained to his amended complaint, and this ruling presents the only question in the record.

The complaint averred, in substance, that David P. Barner, on the 31st day of May, 1877, recovered in the Clinton Circuit Court a judgment against Marcellus Bristow for \$178.64; that at that time said Bristow was the owner in fee simple of more than thirty distinct parcels of land in said county, each

97	236
136	701
97	236
140	147
97	236
150	594

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of which is described, and all of which became subject to the lien of said judgment; that on the 3d day of April, 1879, said Bristow and his wife sold and conveyed to the appellant lots three, four, five and six, block fifteen, in Scircleville, in said county, for the sum of \$400; that on the 23d day of September, 1879, said Bristow and wife sold and conveyed to John Hayden two other parcels of said land, and on the same day he and wife sold and conveyed to Samuel Armstrong another parcel of said land; that on the 16th day of February, 1880, said Bristow and wife sold and conveyed to James W. Richey the northwest quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section thirty-two (32), in township twenty-two (22) north, of range two (2) east, in said county; and on May 10th, 1880, said Bristow and wife sold and conveyed to Samuel Merritt twenty other lots in Scircleville, in said county, which property said Merritt, on the 18th day of May, 1880, sold and conveyed to said Richey; that a portion of the balance of said land had since been sold to other parties, and that the residue was still owned by said Bristow; that on the 13th day of April, 1880, an execution was issued on said judgment and levied upon said land so conveyed to said Richey, who, on the 11th day of September, 1880, "paid said judgment in full to said judgment plaintiff, and fully discharged the same," but instead of cancelling the judgment he had the same assigned to him; that afterwards, to wit, on the 23d day of October, 1880, said Richey caused another execution to issue upon said judgment, which was levied upon a portion of the land still owned by said Bristow and upon the land sold by him to said Hayden, Armstrong and the appellant; that the lands sold by said Bristow, after the appellant's purchase, are worth more than \$1,000, and are sufficient to satisfy said writ; that the lands so levied upon were advertised for sale on the 11th day of December, 1880, and said Richey, well knowing that the lands purchased by him of said Bristow were subject to the lien of said judgment, and were equitably bound for its payment before said land so owned by the appellant, promised him that he would bid off said

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lands so levied upon, other than appellant's land, in satisfaction of said writ; that, relying upon such promise, he made no application to the court for an order requiring the land to be sold in the inverse order of its alienation until the day of the sale, when he learned that said Richey would not carry out his promise; that he then applied for such order, as well as an injunction to enjoin said Richey from selling the appellant's land, but as the judge resided in an adjoining county he was unable to procure such order and serve it in time to prevent the sale; that though such order was issued before the sale, it was not served until after, and while the appellant was attempting to procure its service, said Richey caused the appellant's lands to be offered, and bid them off himself in payment of such judgment, and in violation of his promise; that but for such promise appellant would have applied in season for such order, and would himself have bid off the lands subsequently sold by said Bristow, and thus have protected his own. Wherefore he prays that said sale may be set aside, the judgment cancelled, or the lands subsequently sold by said Bristow may first be exposed to sale to satisfy it.

This complaint was unquestionably good. It is well settled that when a judgment is a lien upon several parcels of land which are afterwards sold to various persons at different times, a court of equity will compel the sale of such land in the inverse order of its alienation. *Day v. Patterson*, 18 Ind. 114; *Sidener v. White*, 46 Ind. 588; *Houston v. Houston*, 67 Ind. 276.

This being the rule in equity, it follows as a sequence that as between the first and any subsequent purchaser, it becomes the duty of the latter to pay the judgment by allowing the land purchased by him to be first applied to its payment, and when such subsequent purchaser, upon whose land the writ issued upon the judgment has been levied, either pays the judgment or takes an assignment of the same to protect his land, such judgment must thereafter, as against a prior purchaser, be deemed extinguished if the land levied upon was of sufficient value to pay it.

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The judgment being extinguished by its actual payment, or by its assignment to one upon whose land it had been levied, and whose duty it was to pay it, no valid sale could thereafter be made to him of the first purchaser's property upon a writ issued upon such judgment. *Harmon v. State, ex rel.*, 82 Ind. 197.

Such levy relieved the prior purchaser from the duty of obtaining an order requiring the property to be sold in the inverse order of its alienation, and such purchase and assignment of the judgment were tantamount to a satisfaction of the same by the application of such property as against a prior purchaser.

If, in this case, the judgment had not been paid, as averred, or if the levy and assignment had not been made, this sale can not stand, for the reason that the appellant was prevented from obtaining an order requiring the land to be sold in the inverse order of its alienation by the promise of the purchaser to bid off the land subsequently sold, and thus protect the appellant. He can not retain an advantage thus obtained. No court will permit such a sale to stand. A party can not relieve his land from a levy by purchasing the judgment, and then collect his money from land equitably exempted from its payment.

The complaint was clearly sufficient upon either of the grounds named, and for the error in sustaining the demurrer the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be hereby reversed, at the appellee's costs, with instructions to overrule the demurrer to the complaint.

Filed June 25, 1884.

ON PETITION FOR A REHEARING.

BEST, C.—In support of the petition for a rehearing in this case, the appellee strenuously maintains that the complaint to which his demurrer was sustained was not properly a part of the record, and for this reason no error was com-

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mitted in sustaining the demurrer. This point was made in the appellee's original brief, but as the record presented no such question, as we thought, we passed it in silence. Now we notice it because it is again pressed upon our attention. A demurrer was overruled to the original complaint in this cause, an answer and reply were filed, after which the court reconsidered its ruling upon the demurrer and sustained it to the complaint. The appellant then filed an amended complaint. The appellee made an unsuccessful motion to strike it from the files, reserved the question by bill of exceptions, and then filed the demurrer, which was sustained. This last ruling is alone assigned as error. This is the condition of the record, and it is manifest from its mere statement that it presents no such question to this court as the appellee attempts to raise. Such question can only arise upon a cross assignment of error. The various cases, holding that certain motions, papers and documents are not parts of the record without being made so by bill of exceptions, have no application to a pleading which constitutes a part of the record without such bill, and the fact that the court will determine such questions without a cross assignment of errors, furnishes no precedent for a similar rule in this case. A cross assignment is inapplicable to such questions, and could not be employed for such purpose.

In addition to this, if the ruling had been properly presented the appellee's position could not be maintained. The bill of exceptions fails to show that any reason whatever was assigned in support of the motion to strike out, and as it appears to have been right, it follows that the ruling would present no question here.

No other question is discussed that was not fully considered and decided in the original opinion. The petition should be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed Oct. 11, 1884.

Boots, Administrator, v. Griffiths, Administrator.

No. 11,355.

BOOTS, ADMINISTRATOR, v. GRIFFITHS, ADMINISTRATOR.

SUPREME COURT.—*Clerk's Certificate to Transcript.*—Where the clerk's certificate, properly worded and authenticated, shows that all the papers in the case, ordered by the appellant, are embodied in the transcript, and these papers indicate on their face that the transcript is full, correct and complete, the certificate is sufficient.

INTERROGATORIES TO JURY.—*Bill of Exceptions.*—It is not necessary that the interrogatories and the answers of the jury thereto should be incorporated in a bill of exceptions.

SAME.—*Harmless Error.*—Where it is clear that the error in propounding an interrogatory to a jury was harmless, it is not cause for reversal.

SAME.—*Opinion of Court.*—The submission of an interrogatory to the jury is not an expression of an opinion by the court upon the evidence.

From the Montgomery Circuit Court.

M. Thompson, W. B. Herod and W. H. Thompson, for appellant.

G. W. Paul and J. E. Humphries, for appellee.

ELLIOTT, C. J.—Counsel for appellee affirm that there is no certificate to the transcript, but in this they are in error. There is a certificate of all papers ordered by the appellant, and they show on their face a complete record of the case. Where there is a certificate of the clerk, properly worded and authenticated, showing that all the papers in the case ordered by the appellant are embodied in the record, and the papers show on their face that the record is full, correct and complete, no more is needed.

Counsel are also in error in asserting that the record does not show that interrogatories were submitted to the jury, for an entry appears in the record showing their submission by the court. It is not necessary that the interrogatories to the jury, and their answers should be incorporated in a bill of exceptions. *Salander v. Lockwood*, 66 Ind. 285. The case just cited overruled *Shaw v. Merchants Nat'l Bank*, 60 Ind. 83, where a different rule was declared. The rule adopted in

Shattuck v. Cox.

Salander v. Lockwood, *supra*, had been previously affirmed in *Campbell v. Dutch*, 36 Ind. 504, and was approved in *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168. This case is, therefore, not within the rule in *The Cleveland, etc., R. W. Co. v. Bowen*, 70 Ind. 478.

We are unable to see how the interrogatory objected to worked appellant any injury, as the general verdict was against him, and on that the judgment is founded. If it were conceded that the court erred in propounding the interrogatory, it is clear that the error was a harmless one, and such an error will not warrant a reversal.

Submitting an interrogatory to a jury is not the expression of an opinion upon the evidence. The court expresses no opinion one way or the other, but simply directs the jury to answer a question.

We think the cause was correctly decided on the evidence.
Judgment affirmed.

Filed Sept. 24, 1884.

No. 10,413.

SHATTUCK v. COX.

JUDGMENT.—*Execution.*—Execution should issue from the circuit court in which a judgment is rendered.

SAME.—*Filing Transcript.*—*Execution.*—*Sheriff's Sale.*—*Quieting Title.*—*Prayer for Relief.*—Where there is an appearance, and it is averred and found that the plaintiff's lands have been sold upon an execution issued by the clerk of V. county upon a transcript of a judgment of the circuit court of S. county, filed in the office of the clerk of V. county, there should be judgment setting aside the sheriff's sale, though that relief be not prayed.

From the Superior Court of Vigo County.

N. G. Buff, J. T. Pierce, D. T. Morgan and S. Coulson, for appellant.

J. T. Scott and C. F. McNutt, for appellee.

HAMMOND, J.—The appellant, who was plaintiff in the

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court below, demanded as relief in his complaint an accounting with the appellee, to ascertain the amount due the latter on his purchase at sheriff's sale of certain lands of the appellant in Vigo county. The appellee's answer was in four paragraphs, the first being the general denial, the second a special denial, and the third and fourth each called a counter-claim. Demurrers were filed and overruled to said third and fourth paragraphs. Reply in denial and by special paragraph. Trial by the court; special finding of facts; conclusions of law in favor of the appellee. The appellant moved for a *venire de novo*, for judgment in his favor upon the special finding of facts, and for a new trial. These motions were overruled, and the court rendered judgment dismissing the action at the appellant's costs.

The facts alleged in the appellant's complaint were to the effect following:

On January 21st, 1874, John Collier obtained judgment in the Sullivan Circuit Court against the appellant and his wife for \$2,210 and the foreclosure of a mortgage. Under the foreclosure, the land therein described was sold at sheriff's sale to Collier, on August 29th, 1874, for \$1,250. Appellant paid Collier on the judgment \$500, on August 24th, 1875. On August 25th, 1875, Collier assigned the residue of the judgment and his certificate of purchase to the appellee. The latter afterwards obtained a sheriff's deed upon said certificate of purchase. Appellant subsequently made payments to appellee on the judgment, amounting to \$329. A certified transcript of said judgment, rendered in the Sullivan Circuit Court, was filed in the office of the clerk of the Vigo Circuit Court, on April 29th, 1875. On this transcript, the appellee caused an execution to issue by the clerk of said Vigo Circuit Court, on August 5th, 1880, under which execution certain lands of the appellant in Vigo county were sold at sheriff's sale to the appellee, on November 11th, 1880, for \$1,353, that being the balance of principal, interest and costs claimed by the appellee to be due upon said judg-

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ment. It is averred in the complaint that the amount due on the judgment at the time of the sale was only \$500.

As no judgment was rendered in favor of the appellee upon either of his counter-claims, and as in our opinion none can be rendered thereon in the present action, the error, if any, of overruling the appellant's demurrer to said counter-claims was harmless.

The special finding of facts embraces many questions not properly in issue under the pleadings. It is found, however, that the judgment under which the appellant's lands in Vigo county were sold was rendered in the Sullivan Circuit Court; that a transcript thereof was filed in the office of the clerk of the Vigo Circuit court; and that the sale of said lands in Vigo county was made under an execution issued upon the transcript of that judgment by the clerk of the Vigo Circuit Court. This finding sufficiently covered the issues to make a *venire de novo* unnecessary.

The statute authorizes the transcript of a judgment to be filed in the office of any clerk of the circuit court in this State, and from the time of such filing the judgment becomes a lien upon the real estate of the judgment debtor in the county in which the transcript is filed. Sections 610 and 611, R. S. 1881. As to a judgment rendered before a justice of the peace, the statute authorizes the issue of an execution, in certain cases, by the clerk of the court where the transcript is filed. Sections 612, 613 and 614, R. S. 1881. But as to other judgments the execution must issue from the court in which they were rendered. 2 Works Pr., section 1141; Freeman Ex., sections 10 and 15.

The issue by the clerk of the Vigo Circuit Court of the execution upon the transcript of the judgment rendered in the Sullivan Circuit Court, was without authority of law. The execution and the sale thereunder were void.

The appellant's demand for relief did not specifically ask that the sale of his Vigo county lands be set aside, but he was clearly entitled to that relief under the facts stated in

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his complaint and specially found by the court. The sale of his land under an unauthorized execution placed a cloud upon his title, for the removal of which he was entitled to equitable relief. Where, as in the present case, the defendant answers the complaint, the court may grant any relief consistent with the case made by the complaint and embraced in the issues, even though such relief exceeds that demanded in the complaint. Section 385, R. S. 1881.

The appellant's motion for judgment in his favor on the special finding of facts should have been sustained.

The judgment is reversed at appellee's costs, with instruction to the court below to render judgment for the appellant setting aside the sheriff's sale of his lands in Vigo county, described in his complaint, leaving other questions embraced in the special finding of facts to be settled between the parties in another action.

Filed June 20, 1884. Petition for a rehearing overruled Nov. 11, 1884.

No. 11,643.

HENDRICKS ET AL. v. CARSON ET AL.

COSTS.—*Bond for.*—*Non-Resident.*—*Statute Construed.*—The bond to secure costs required of a non-resident plaintiff by R. S. 1881, section 589, covers the costs on appeal to the Supreme Court.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellants.

D. Moss, *R. R. Stephenson* and *H. A. Lee*, for appellees.

FRANKLIN, C.—Appellants sued appellees as sureties on a non-resident plaintiff's bond for security for costs filed in the circuit court. The case in which the bond was filed was tried in the circuit court, and a judgment was rendered for the plaintiff; it was appealed to the Supreme Court, where the judgment was reversed, and retried in the circuit court, and

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resulted in a final judgment for the defendants, whereupon this suit was brought upon the bond for costs.

The plaintiff in this case included in his bill of particulars accompanying his complaint the costs that had accrued in the case in the Supreme Court, as well as the costs in the circuit court.

On motion of appellees, the court struck out of the bill of particulars the costs that had accrued in the Supreme Court, and that presents the question for consideration.

The 589th section, R. S. 1881, provides that "Plaintiffs who are not residents of this State, before commencing any action, shall file in the office of the clerk a written undertaking, payable to the defendant, with surety to be approved by the clerk, for the payment of all costs which may accrue in the action to the proper officer or person."

The case in the Supreme Court was the same "action" that had been commenced in the circuit court. The law gave the defendant the right to appeal the case to the Supreme Court for final determination. The proceedings in the Supreme Court were a regular part of the legal proceedings in the action, and the costs accruing thereon in the Supreme Court were a part of the costs legitimately accruing in the action, and we think that it is within the letter and spirit of the statute to hold that the bond of a non-resident plaintiff for costs, filed in the circuit court, covers the costs that accrued in the Supreme Court on an appeal of that action. Were a contrary rule of construction adopted, in such cases, there would be no means of securing the costs accruing in the Supreme Court.

We think the court below erred in striking out the costs that had accrued in the Supreme Court, for which error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellees' costs.

Filed Sept. 27, 1884.

 Ellis et al. v. The Elkhart Car Works Company et al.

No. 11,283.

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ET AL.

97	247
135	907
97	247
153	459

DEED.—Condition Subsequent.—Breach.—Demand of Performance.—A conveyance of lands provided that if the grantee should fail to use the granted premises for the manufacture of cars for a term of six consecutive months at a time, the same should revert. A complaint by the grantor alleged a breach, and that the defendant on demand refused to deliver possession.

Held, that a failure to aver demand of performance was not required, nor was it necessary to allege that the demand for possession was accompanied by notice that it was for the breach of the condition.

Held, also, that an answer, alleging that the process of manufacturing was carried on in good faith, though no cars were fully completed in six months, was good.

From the Elkhart Circuit Court.

H. D. Wilson and *W. J. Davis*, for appellants.

J. M. Vanfleet, for appellees.

ELLIOTT, C. J.—In the deed set forth in the first paragraph of the appellants' complaint is written the following: "This deed is executed on condition that if the grantee, her grantees or assignees shall at any time within three years from this date fail, neglect, or refuse to use said real estate for the manufacture of cars for a term of six consecutive months at a time, said real estate shall revert to said grantors." It is alleged that the appellants were the grantors, and that no consideration was paid for the land; that the defendant failed to use the land for the purpose specified for the period intervening between December 1st, 1882, and July 11th, 1883; that on the day last named the appellants "re-entered upon said premises and then and there demanded of said company a reconveyance to them of said property and a delivery of possession, but the defendant refused to convey or deliver possession."

Two objections are urged against this pleading: *First*. That it does not aver a demand for performance. *Second*. That it

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does not aver that the appellants entered for a breach of the condition. Of these in their order.

The decisions of this court establish the rule that there must be a demand of performance by the party entitled to insist upon a forfeiture of the estate. *Cory v. Cory*, 86 Ind. 567; *Schuff v. Ransom*, 79 Ind. 458; *Risley v. McNiece*, 71 Ind. 434; *Lindsey v. Lindsey*, 45 Ind. 552. This, however, is a general rule, to which there must be exceptions, and a case such as this constitutes an exception. The grantors in a deed like the one before us could not demand performance until six months had elapsed in which there was a failure to use the property for the purpose specified, and when that time had elapsed the breach of the condition would be complete without a demand. If a demand of performance should be deemed essential, then the result would be an extension of time beyond that expressly provided in the deed, and this would, in effect, add a new provision to the instrument. The grantors had no right to complain that there was a failure to perform until after the full expiration of the six months specified, and when that period had elapsed the right to insist upon a forfeiture became perfect by the terms of the deed. Nothing was needed to complete the right to enter for a breach. It is legally impossible to conceive it necessary that there should be a demand for performance, for none could be made until after the lapse of the time designated, and then performance according to the contract would be impossible. The case in hand is unlike those in which there is no specification of the act to be done, and no fixed limitation as to the time of performance; and in our opinion it belongs to the class where a demand for performance is not essential to a right to enter for breach of condition. 1 Lead. Cases Real Prop. 145; 1 Smith Lead. Cases (7th ed.), top p. 124.

Where no definite act is fixed, and no precise time is limited for the performance, then a demand may be necessary; but in the present case the provision is that if the grantee shall fail, neglect or refuse to perform the act specified within

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a fixed and limited time, the property shall revert. The act is designated, and the time for performance is limited and made of the essence of the contract; there is nothing, therefore, to be determined by a demand; all is determined by the lapse of time and a failure to perform, so that a demand of performance could subserve no useful purpose.

The rule in this State is that a demand for possession is equivalent to an entry. *Cory v. Cory*, *supra*; *Indianapolis, etc., R. W. Co. v. Hood*, 66 Ind. 580; *Clark v. Holton*, 57 Ind. 564. It is sufficient to aver a demand, but the demand must be such as the law requires. This brings us to the second objection urged against the pleading, for, if the demand is not such as the law requires of the plaintiff, it can not take the place of an entry; on the contrary, it goes for nothing. It is not enough to aver a demand; it must also be shown to be such as the law deems sufficient.

If it be true, as the appellee contends, that the complaint must show that the entry was for breach of condition, then it must follow that the pleading should show that the demand for possession was made upon the ground that there was a breach of condition. A demand sufficient to take the place of an actual entry must be placed upon the same grounds as are necessary to make an entry effective. We have, however, not been able to find any case sustaining the contention of the appellee, that it must be shown that the entry was for breach of condition; on the contrary, it is held that an entry is sufficient without a declaration that it is for a breach of condition. The question was well discussed in *Bowen v. Bowen*, 18 Conn. 535, and it was held that it was not necessary to declare that the claim or entry was for a breach of condition, and, in the course of the opinion, it was said: "It does not seem to be necessary now, that the party should declare at the time, for what purpose he enters. Indeed, it is very doubtful, whether this was ever necessary, though it is so laid down in 1 Wms. Saund. 119, n. 1. Lord DENMAN, in *Doe v. Williams*, 5 B. & Adol. 783, says: 'If a party en-

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ters to claim the premises as his own, it is not necessary for him to say, what particular act, adverse to his interests, he means to defeat.' And PARK, J., says, that the authorities cited in support of the note in Mr. Serjeant Williams' *Saunders*, do not support that proposition." In 1 Smith Leading Cases (7th ed.), top p. 124, is this statement: "In general, a grantee who has taken subject to a condition, must acquire all the information necessary for its performance, and no demand need be made or notice given before entry by the grantor." Our own case of *Clark v. Holton*, *supra*, impliedly at least, decides that it is not necessary that the entry or claim should be shown to have been made for breach of condition. Our conclusion on this point is that it is not necessary to aver that the claim to possession was made upon the ground that there was a breach of the condition, but that it is sufficient to show either an entry or a demand for possession.

There is a material difference between the first and second paragraphs of the complaint, for the latter paragraph avers that there was a demand for performance, and also avers that the entry was declared to have been made for a breach of condition, and, according to the ruling on the demurrer to the first paragraph, it would have been necessary for appellants to prove these averments, and a burden greater than that necessary to sustain a cause of action under the first paragraph was cast upon them. It can not, therefore, be justly said that the two paragraphs are the same, for the second requires more evidence than the first. There was material error in sustaining the demurrer to the first paragraph of the complaint.

We have pointed out the material difference between the two paragraphs of the complaint; in all other respects they are substantially alike. The answer of the defendants admits the execution of the deed, and that title was derived from it, admits the demand for possession, and alleges that no consideration was paid except the promise contained in the con-

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dition embodied in the deed. It is alleged that the land was vacant when possession was taken under the deed, and was of the value of \$3,000; that the car works company, with the intention to manufacture cars, did, in the spring of 1882, erect on the land brick buildings, for the manufacture of cars, at a cost of \$20,000, and for a like purpose placed in said building machinery of the value of \$15,000; that the company expended \$20,000 in buying material out of which to manufacture cars, and placed it on the premises for use; that the company did manufacture one car complete, and three thousand axles and car wheels. It is further alleged that "it was contemplated by the plaintiffs and said car works company that said company should erect on said premises the buildings hereinbefore mentioned, and that said company should put in the machinery and fixtures and get together the material as hereinbefore set forth, so as to enable said company to manufacture railway freight cars; that it was known to and contemplated by said parties, that it would take said company at least four months to erect the said buildings and put in said machinery and fixtures; and defendants say that said buildings were erected on said premises, and machinery and fixtures put therein, within four months from December 1st, 1881, at a cost of \$30,000; and that said buildings, machinery and fixtures still remain on said premises, and increase the value thereof \$30,000; and they further say that all of said acts of said company in erecting said buildings and placing therein said machinery and fixtures, and the purchasing of said material, and the manufacture of said car wheels, were done in good faith, for the purpose of manufacturing cars; and that all of said acts were in furtherance of said purpose; and hence they say that said company did not fail for six consecutive months to use said real estate for the manufacture of cars."

This answer is sufficient, and there was no error in overruling the demurrer of the appellants.

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Conditions subsequent are not favored, and courts will not divest an estate except in clear cases. A strict performance of the condition is not required; a substantial compliance is all that is necessary. In construing the provisions of the deed, a liberal construction will be adopted in favor of the grantee, and a strict one as against a grantor claiming a right to forfeit the estate.

The grantee, as the facts stated in the answer show, did use the property for the manufacture of cars. If the car company was engaged in making any part of a car they were engaged in the manufacture of cars within the meaning of the condition written in the deed, for that condition only requires that the land be used for the manufacture of cars. While engaged in the process of manufacturing cars the company was performing the condition, although no car had been fully completed within a period of six months. The condition does require that the business of manufacturing cars shall not cease for a continuous period of six months, but it does not require that any car shall be entirely built within that time. If the company did engage in the business of manufacturing cars, and did not for any period of six consecutive months cease to conduct that business, there can be no forfeiture for a breach of condition. There must, of course, be more than a mere pretence of manufacturing; the process in some of its stages must be actually carried on.

A breach of a condition does not of itself work a forfeiture of the estate; there must be a claim for possession, or an entry. The answer shows that one car was fully manufactured before any entry or demand, and this, of itself, averted the forfeiture, for it is well settled that performance before entry or demand will be sufficient.

The provision copied from the deed does not create a limitation, but is, in form and in substance, a condition subsequent. The estate created by the deed is upon a condition subsequent, and is not an estate by limitation. The rules applicable to estates upon condition subsequent govern both.

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as to the construction of the deed and as to the question of the sufficiency of performance.

For the error in sustaining the demurrer to the first paragraph of the complaint the judgment must be reversed.

Filed June 18, 1884. Petition for a rehearing overruled Nov. 12, 1884.

No. 11,401.

DEHORITY v. PAXSON ET AL.

97	286
158	212

INSTRUCTIONS.—Evidence.—Harmless Error.—An erroneous instruction, which, in view of the evidence, could not injure, is not available error.

SALE.—Statute of Frauds.—Delivery.—A delivery of goods, so as to take a sale thereof out of the statute of frauds, can not be accomplished by mere words, without some act of the purchaser amounting to a receipt thereof.

CHATTEL MORTGAGE.—Replevin.—Evidence.—A chattel mortgage of "all the furniture, lumber and materials" in a certain furniture factory described, and all furniture afterwards made in said factory, will cover furniture afterwards manufactured there out of said materials and lumber; and in replevin by the mortgagee for such furniture afterwards manufactured, it is error to exclude evidence that the furniture described in the complaint was made in that factory of said materials.

From the Madison Circuit Court.

M. A. Chipman and *J. W. Sansberry, Jr.*, for appellant.

C. L. Henry and *H. C. Ryan*, for appellees.

BLACK, C.—The appellant brought his action against the appellees, Joseph R. Paxson and Thomas C. Paxson, to recover possession of certain personal property and damages for the detention thereof. There was an answer of general denial, and a trial by jury resulted in a verdict for the defendants. A motion for a new trial, made by the plaintiff, was overruled, and judgment was rendered upon the verdict. The overruling of the motion for a new trial has been assigned as error.

The property in controversy consisted of a lot of furniture and lumber and other materials of a furniture manufactory,

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amounting in value, as shown by the verdict, to seven hundred and fifty dollars. It appeared from the evidence that this property had been owned by the defendant Joseph, and that a short time before the commencement of this action he had sold and delivered it to his co-defendant. The plaintiff based his alleged right to recover upon two distinct grounds, the former of these in the order of the evidence being what was set up as a sale to him by said Joseph prior to his said sale to his co-defendant, and the other being a chattel mortgage of yet earlier date executed to the plaintiff by said Joseph.

The evidence showed that, on the 16th of July, 1883, a schedule of furniture and materials in the furniture manufactory of said Joseph at the city of Anderson was made, the prices or values of all the articles being set down therein, amounting to seven hundred and fifty-eight dollars. This invoice was written by an agent of the plaintiff, his son, who was assisted in ascertaining the articles and appraising them by one person whom said agent chose for that purpose, and by another chosen for such purpose by said Joseph, who also was present. Said Joseph then owed the plaintiff the mortgage debt, and was also indebted to him in some amount for rent, and the invoice appears to have been made in contemplation of a transfer of the invoiced property to the plaintiff upon said indebtedness. On the 1st of August, 1883, said agent, accompanied by the plaintiff, again went to said manufactory and stated to the defendant Joseph that they had come to get the furniture; but in the mean time said invoiced articles, or the greater portion thereof, had been sold and delivered by said Joseph to his co-defendant. Thereupon this action was commenced.

The court, at the request of the defendants, gave the jury certain instructions, numbered 2, 3 and 4, to which objections are made.

The instruction numbered 2 was as follows: "If the property in controversy belonged to the defendants, or either of them, and the plaintiff claims to have purchased the same

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from them, he can not recover in this case, if the property in controversy was of a value exceeding fifty dollars, unless the possession of the property was delivered by the defendant to the plaintiff, or unless the contract of sale was in writing and signed by the defendant, or unless the property was paid for in whole or in part, or something in earnest delivered by him."

The instruction numbered 3 was to the same effect.

Section 7 of our statute of frauds (R. S. 1881, section 4910), is as follows: "No contract for the sale of any goods, for the price of fifty dollars or more, shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

A comparison of this statute with the instruction quoted discloses in the latter much looseness and inaccuracy, yet it appears that the appellant was not harmed thereby.

The evidence was such that the jury could have found that no contract, either executed or executory, was completed; that there was but an unfinished negotiation. If there was a contract, it was one for the sale of goods for the price of more than fifty dollars; there was no note or memorandum in writing of the bargain signed by said Joseph or any person thereunto by him lawfully authorized, and the plaintiff gave nothing in earnest to bind the bargain. If there was a contract of sale, payment for the goods was to be made by giving said Joseph credit for the amount of the goods upon his indebtedness to the plaintiff; but it was shown, and that by the testimony of the plaintiff's said agent, that no such credit was given before the 1st of August, 1883. Therefore, nothing was given in part payment. But the appellant claims that there was evidence which proved, or tended to prove, and from which the jury could have found, that he, through his said agent, received part of the property from said Joseph; and thereupon

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he objects to the words "unless the possession of the property was delivered by the defendant to the plaintiff."

The language of the statute is, "unless the purchaser shall receive part of such property." To constitute a receipt of property, as contemplated by the statute, it is true that there must be a delivery by the seller. What is required is an act of the purchaser, that he shall receive. This involves delivery, but it is not intended that the seller by his act of delivery shall be able to render the contract enforceable against the purchaser without his receiving the goods or some part thereof as his property under the contract. The seller must part with his control with the purpose of vesting the right of property in the buyer, who must receive with such intent on his part. The receipt by the purchaser of a part of the goods, which would involve the delivery of a part, would satisfy the statute. If the instruction had required a delivery of a part only of the goods, it would have been too favorable to the appellant, but by the use of the words objected to it required too much.

There was evidence that, in the course of the invoicing, the parties came to a lot of bed-posts, as to which, after invoicing them, the appellant's said agent held a conversation with said person who was assisting on behalf of said Joseph in the invoicing. There were in the same room some unfinished safes owned by said person assisting, who was also a furniture dealer. Said agent having objected to the price of the bed-posts, said person assisting contended that they were worth a certain amount, whereupon said agent asked said other person if he would take them for that, and he said that he guessed he would; and said agent asked said owner of the safes if he would trade them for the bed-posts, and the latter answered that he would. Said Joseph was present and did not object. This was before the invoicing was ended. The safes do not appear to have been mentioned in the invoice, which included the bed-posts, which were described also in the complaint and in the accompanying affidavit.

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None of the goods invoiced were separated from other goods, nor were any articles removed from the places in which they were found by said persons. The goods were merely viewed by said persons, while their prices were estimated and said schedule was written.

To maintain his action the plaintiff could rely only upon his own title, and could not support his claim to any part of the property by proof of ownership thereof in another.

If there was any contract, there plainly was no conditional sale and delivery of property. Proof of an otherwise executory agreement for a sale of goods could not support replevin; for the contract of sale which will support such an action must be one under which the party acquires the right of possession.

If the evidence showed an executed contract of sale, sometimes called a bargain and sale, none of the goods other than said bed-posts were received under it.

The evidence relied on to prove the receipt of this part of the goods shows a merely oral communication between the plaintiff's agent and said owner of the safes, before any contract of sale was completed between the plaintiff and said Joseph. It does not show any act of any person, but shows merely words; and at the time when they were spoken the plaintiff had not acquired any title to the property which he proposed to exchange. The statute is intended as a guard against fallible recollection of oral communications and the facility for the perpetration of fraud by means of false evidence concerning such language. The receipt of a part of the goods sold by an oral contract can not be proved by evidence of mere words used by the parties; there must be some act. Though oral language of the parties may be admitted as part of the *res gestæ*, to explain an act which they accompanied as being a receipt of the goods, evidence of such language can not of itself prove a receipt within the meaning of the statute.

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Here there was no delivery of the bed-posts to any person. The alleged seller did not part with his possession or control; they were not actually received by the plaintiff as his property pursuant to a completed contract of sale, as a part of the goods transferred by such a contract; nor were they so received by any other person.

So far as there were any acts of the parties in relation to said bed-posts, they were of the same character as their acts in relation to all the other goods. See *Shindler v. Houston*, 1 N. Y. 261.

There having been no evidence from which a receipt of any part of the property by the plaintiff within the meaning of the statute could be found, he was not harmed by the failure of the court to indicate to the jury that his receipt of a part of the goods would take the contract, if there was one, out of the operation of the statute. ●

In the chattel mortgage introduced in evidence, executed by the defendant Joseph R. Paxson to the plaintiff April 27th, 1882, and recorded the next day, the mortgaged property was described as follows:

“All the furniture, lumber and materials in and pertaining to the furniture factory and planing mill known as the Hoosier Planing Mill and Furniture Manufactory of the city of Anderson, Indiana, consisting of bedsteads, tables, chairs, bureaus, dressing-cases, and all other furniture usually made in furniture factories; also walnut lumber, one planer, and all furniture hereafter made in said factory.”

The fourth instruction to the jury was as follows:

“The plaintiff can not recover possession of the property in controversy by virtue of the chattel mortgage introduced in evidence, unless the evidence shows it to be the same property described in the mortgage.”

This seems to be a correct proposition, and it is not criticised except because of its supposed effect in connection with the action of the court in excluding certain evidence. The instruction, being a correct general statement of the law, was

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not in itself erroneous, and if the appellant desired a particular and definite instruction pointing out which goods should be regarded as the same property as that described in the mortgage, he might have so requested the court. We think that if there was error it was in the exclusion of evidence, and not in the instruction.

The plaintiff examined as a witness the defendant Joseph R. Paxson, the mortgagor. In the course of the examination, this witness testified that none of the furniture mentioned in the mortgage was contained in the invoice. The plaintiff then offered to prove by said witness that the furniture described in the invoice and in the complaint was manufactured in said factory, and out of lumber and materials mentioned and described in said mortgage. The court, upon the objection of the defendants, excluded this offered evidence.

The question here presented for decision is not one involving the consideration of the subject of mortgaging after-acquired chattels, or a determination whether or not a mortgage of merely all furniture thereafter made in said factory would hold such furniture as against the mortgagor or his vendee for value with constructive notice.

As to the furniture indicated in the offered evidence, the mortgage was a legal, and not a merely equitable mortgage. It was a mortgage of existing specific lumber and materials with a sufficient manifestation in the mortgage of the intention of the parties thereto that it should hold the manufactured articles, the character of which was indicated, which should be made from said lumber and materials at the particular place at which they were shown by the mortgage to be located. Furniture manufactured in said factory from the lumber and materials mentioned and described in the mortgage was included in the mortgage, and such furniture was sufficiently described by the terms of the mortgage to be capable of identification by parol evidence.

As against the defendants, the plaintiff could recover, by virtue of the mortgage, the furniture described in the com-

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plaint, which was shown to have been removed recently from said factory, by proving that it was made there of the lumber and materials mentioned and described in the mortgage. Therefore, the court erred in excluding said evidence, and the judgment should be reversed.

PER CURIAM.—Upon the foregoing opinion, the judgment is reversed, at the costs of the appellees, and the cause is remanded for a new trial.

Filed Sept. 27, 1884.

No. 11,191.

BREWSTER v. BAKER.

PROMISSORY NOTE.—*Consideration.*—*Surrender of Prior Note.*—*Principal and Surety.*—As between the principal and the payee of a promissory note, the surrender by the latter to the former of his prior valid note, for the same amount, is a sufficient consideration for the new note; and where the consideration is sufficient, as between the payee and principal, it is sufficient, also, as between the payee and surety in such new note.

From the Harrison Circuit Court.

B. P. Douglass, S. M. Stockslager, W. N. Tracewell, R. J. Tracewell and W. A. Porter, for appellant.

S. J. Wright, W. T. Zenor and L. Jordan, for appellee.

HOWK, J.—This was a suit by the appellee against one Willison Hisey and the appellant, Brewster, upon their joint and several promissory note. On June 5th, 1882, judgment for want of an answer was rendered against the defendant Hisey for the amount due on the note. Afterwards the appellant, Brewster, answered in a single special paragraph, to which the appellee replied by a general denial. The issues joined were tried by the court, and a finding was made for the appellee for the amount of the note and interest. Over appellant's motion for a new trial, judgment was rendered on the finding.

Error is assigned here upon the overruling of the motion

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for a new trial. It is claimed by appellant, and, indeed, is conceded by the appellee, that Brewster was the surety and Hisey the principal in the note in suit. The facts of the case, as shown by the evidence, were substantially as follows: On November 6th, 1879, the appellee loaned the defendant Hisey the sum of \$1,050, taking therefor Hisey's individual note, payable one day after date, and bearing interest at the rate of eight per cent. per annum. Hisey paid the interest on this note up to the 6th day of November, 1881. In the spring of 1882 the appellee informed Hisey that he must have security for the loan, and that, if the latter would give such security, he should not be disturbed. About the 10th day of May, 1882, the note in suit was executed by Hisey and the appellant to the appellee for the same sum expressed in the old note, and it was dated back to November 6th, 1881, for the purpose of covering and securing the interest which had accrued since that date on the old note. The new note was payable one day after date, and bore the same rate of interest as the old note. This suit was commenced on the 24th day of May, 1882, at the request of the appellant, who had become alarmed about Hisey's solvency. Upon the delivery of the new note the old note was surrendered to Hisey. There is evidence in the record from which the court might have found that the appellant knew, at the time he executed the note in suit, that such note was given in lieu of the old note, for the purpose of securing the payment to appellee of his former loan to Hisey, although this was denied by the appellant.

It is claimed on behalf of the appellant, that, as to him, the note in suit evidenced his several promise to pay the already existing debt of Hisey, from which he, Brewster, had received no benefit, and the consideration of which had been advanced, without his knowledge or request, by the appellee to Hisey. It is insisted, therefore, by his counsel, that Brewster's promise to pay the previously existing debt of Hisey, though in writing and evidenced by the note sued upon, was

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void and of no binding force, because it was not shown to have been founded upon a new consideration. In support of their position the appellant's counsel cite and rely upon the following cases in our own reports: *Bingham v. Kimball*, 17 Ind. 396, *Starr v. Earle*, 43 Ind. 478, *Crossan v. May*, 68 Ind. 242, and *Clodfelter v. Hulett*, 72 Ind. 137.

The law stated by the court in each of the cases cited by counsel is good law, and applicable to the facts of the particular case in which it is enunciated. But an examination of the opinions in those cases will show very clearly, as it seems to us, that the facts in each of the cases are utterly unlike the facts in the case in hand. In each of the cited cases it is held, substantially, that the separate individual promise of one person, whether verbal or written, to pay an existing debt of another person, is not valid and binding and is a mere *nudum pactum*, unless it be founded on some new consideration other than such previously existing debt. The doctrine of these cases is no doubt correct, but it is wholly inapplicable, we think, to the facts of the case we are now considering. Here the promise of the appellant to pay the previously existing debt of Hisey was not his separate individual promise to pay such debt; but, as shown by the note in suit, he and Hisey, or either of them, promised to pay such note, the consideration of which note, as we have seen, was Hisey's previous debt and the surrender of his old note.

The surrender of the old note, and the substitution of the new note therefor, certainly constituted a sufficient consideration for the new note, as between the payee and Hisey, the principal therein; and this being so, it must be held, we think, that the consideration of the new note was sufficient to sustain it as against the appellant, the surety of Hisey therein. *Coffin v. Trustees, etc.*, 92 Ind. 337; *Reed v. Coale*, 4 Ind. 283.

Appellant's counsel complain in argument of the ruling of the court in permitting the introduction of certain evidence tending to prove the appellant's admission that he was liable on the note in suit, and his request that the appellee would in-

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stitute suit on such note. The admission of this evidence was objected to by the appellant on the ground that it was incompetent, immaterial and irrelevant, and tended only to prove facts which transpired after the execution of the new note. The court committed no error, we think, in overruling these objections, or in the admission of the evidence complained of.

Appellant's motion for a new trial was correctly overruled. The judgment is affirmed, with costs.

Filed May 28, 1884. Petition for a rehearing overruled Sept. 19, 1884.

No. 11,531.

JOHN v. BRADBURY, ADMINISTRATOR.

WILLS.—*Construction.*—*Widow.*—*Descents.*—A will gave to the wife of the testator all his property, real and personal, to use, sell and dispose of as she might see fit, “for her own comfort and convenience,” with power to convey the real estate in fee simple if her necessities or comfort require it. A subsequent clause directed that the residue of his “property or moneys, if any should be left after her death and full payment of her funeral expenses, be equally divided between” his children, of whom there were two only, the fruit of a former marriage.

Held, that any of the property undisposed of and not consumed by the wife went, at her death, to the children, save enough to discharge her funeral expenses.

Held, also, that she could not dispose of such property by will.

From the Wayne Circuit Court.
W. A. Peelle and J. F. Robbins, for appellant.
H. C. Fox and H. S. Howell, for appellee.

HAMMOND, J.—The following facts are gathered from the pleadings in this case: On January 11th, 1872, Noble Newport executed his will as follows:

“I, Noble Newport, of the county of Wayne, and State of Indiana, do make and publish this, my last will and testament, in form following, to wit:

97	263
135	653
97	263
137	652
97	263
141	186
143	380
97	263
0155	834
155	335
155	336
97	263
163	421

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“Item 1st. I give and bequeath to my wife, Mary C. Newport, my property, both personal and real, to hold and possess, sell, use and dispose of as she may see fit, for her own comfort and convenience, and hereby empower her to sell what realty I may be in possession of at my death, and convey the same by deed in fee simple, if her necessities or comfort require it.

“Item 2d. The residue of my property or moneys, if any should be left after her death and full payment of her funeral expenses, be equally divided between my two (2) children, Joseph W. Newport and Amanda Wright.

“And I hereby constitute and appoint my said wife, Mary C. Newport, my sole executor, without bond or security being required. In testimony whereof, I have hereunto signed my name and affixed seal this 11th day of January, 1872.”

The testator died in 1873, owning real estate and personal property of the value of \$4,000, and leaving surviving him his widow, said Mary C. Newport, and two children, said Joseph W. Newport and Amanda Wright. These children were by a former marriage. The widow was the testator's second wife, and by her he had no children. After his death, the widow procured the probate of his will, and, without taking out letters of administration, entered into possession of the decedent's property, and occupied, used and enjoyed it the same as her own, during her life. She died in 1882, leaving a will in which she devised and bequeathed her property to certain of her relatives and friends. After her death the appellant took out letters of administration upon the estate of said Noble Newport, and took possession of six promissory notes payable to said Mary C. Newport, which she had received from loans of money derived from the estate of her deceased husband. The appellant, as such administrator, with the proceeds of these notes, paid the funeral expenses of said Mary C., settled the estate of said Noble, and made distribution of the balance to said Joseph W. Newport and Amanda Wright. The appellee, as the administrator with

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the will annexed of said Mary C., brought this action against the appellant to recover the value and amount of said notes. An answer was filed by the appellant in five paragraphs, the first of which was the general denial, afterwards withdrawn, and to each of the others of which the appellee's demurrers for want of facts were sustained. The appellant declining to amend, judgment was rendered against him in favor of the appellee for \$1,900.

The question presented by the ruling upon the demurrers to the special paragraphs of answer is as to the quantity of the estate that was devised to Mary C. Newport by the will of her husband. Her administrator, the appellee, claims that the will gave her, absolutely, the whole estate, leaving no remainder to go, at her death, to the said children of Noble Newport. The appellant claims, upon the other hand, that the will gave the widow only a life-estate, with the power of disposing of it absolutely, so far as was necessary for her comfort and convenience, and that the residue of the property undisposed of at her death, after payment of her funeral expenses, went to the children of the decedent, named in the second clause of the will. We are of the opinion that the appellant's construction of the will must prevail.

A will should be construed so as to render, if possible, every part of it effective; and in such construction the intention of the testator must govern in all cases where effect can be given to it without violating the rules of law. *Lutz v. Lutz*, 2 Blackf. 72; *Kelly v. Stinson*, 8 Blackf. 387; *Jackson v. Hoover*, 26 Ind. 511.

An "heir is not to be disinherited without an express devise or necessary implication; such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary can not be supposed." 3 Jar. Wills, 704.

"All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole, but, where several parts are absolutely irreconcilable, the latter [later] must prevail." 3 Jar. Wills, 705.

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The clause in a will which is posterior in local position must prevail, the subsequent words being considered to denote a subsequent intention. *Evans v. Hudson*, 6 Ind. 293; *Holdefer v. Teifel*, 51 Ind. 343; *Critchell v. Brown*, 72 Ind. 539.

In *Sweet v. Chase*, 2 N. Y. 73, it is said: "It frequently happens, that the effect of one clause in a will is qualified by another."

The first clause of the decedent's will, disconnected from the second, would give the whole of his estate to his widow. But the first clause must be construed with the second, and, thus read, the testator's intention becomes plain that he designed to give his widow only a life-estate, with power to dispose of the property absolutely, for her own comfort and convenience, leaving such portion as might be undisposed of at her death, and after payment of her funeral expenses, to his children. It could not have been the intention of the testator that the property undisposed of at her death, devised by his will, should go to her heirs or devisees, strangers to his blood, to the exclusion of his own children. The construction we give the will is quite fully sustained by the following cases: *Baker v. Riley*, 16 Ind. 479; *Johnson v. Battelle*, 125 Mass. 453; *Burleigh v. Clough*, 52 N. H. 267; S. C., 13 Am. R. 23; *Pierce v. Ridley*, 1 Baxt. (Tenn.) 145; S. C., 25 Am. R. 769; *Urich's Appeal*, 86 Pa. St. 386; S. C., 27 Am. R. 707; *Trustees, etc., v. Kellogg*, 16 N. Y. 86; *Terry v. Wiggins*, 47 N. Y. 512.

We think the court erred in sustaining the demurrers to the appellant's special paragraphs of answer.

The judgment is reversed, at appellee's costs, with instruction to overrule said demurrers, and for further proceedings in accordance with this opinion.

Filed June 19, 1884. Petition for a rehearing overruled Nov. 13, 1884.

Louisville, New Albany and Chicago Railway Company v. Porter.

No. 11,228.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. PORTER.

RAILROAD. — *Fencing.* — *Cattle-Pits.* — Where a cattle-pit and wing fence are unnecessarily placed fifty feet from the line of the highway at a highway crossing, and an animal attempting to cross the railroad from the intervening space is killed by the cars, the railroad company is liable under the statute.

INSTRUCTION. — *Harmless Error.* — An erroneous instruction which could not possibly have injured the appellant is not available error.

From the Montgomery Circuit Court.

A. D. Thomas, for appellant.

L. J. Coppage, for appellee.

ZOLLARS, J. — Appellant appeals from a judgment in favor of appellee for the value of a horse killed upon its track. The action is based upon the statute in relation to fencing railroad tracks. Art. 4, ch. 38, R. S. 1881. The collision occurred near where the railroad crosses a public highway obliquely.

On the east side of the highway there is a cattle-pit, with wing fences leading up to it on either side.

The witnesses do not agree exactly, but the conclusion to be drawn from their statements is that the cattle-pit is about fifty feet east from the east line of the highway. On the north side of the railroad, parallel with and some distance from it, there is a fence extending from the highway and joined to the wing-fence at the cattle-pit. The space bounded by the fence, the railroad and wing-fence, is what the witnesses and counsel call the pocket. From this the fences prevent an escape to the north or east. Previous to the collision, the horse was upon the space so bounded as above stated. As a train approached from the northwest, he attempted to cross the track to the south, and was struck by the train and killed.

It is established by the decided weight of the evidence, that

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this space, or pocket, is no part of the public highway, and that the cattle-pit might be placed at the highway without any interference with it, or any inconvenience to any one. Had it been so placed, with proper fences connected, the collision could not have occurred. That railway companies are bound, under the law, to maintain proper cattle-pits to prevent the ingress of animals from public highways, is well settled by the adjudicated cases. *Evansville, etc., R. R. Co. v. Barbee*, 74 Ind. 169.

In the general verdict for appellee, there is necessarily included a finding that the space, or pocket, from which the horse went upon the track, might and should have been, but was not, fenced so as to prevent the ingress of animals. There was no fence opposite, on the south side of the track, nor was there any other fence to exclude them. We can not, therefore, disturb the verdict upon the weight of the evidence.

Another reason why we could not disturb the verdict upon the evidence is, that all of the evidence is not before us. There is a statement in the bill of exceptions that it contains all of the evidence given in the cause, but other portions of the bill show that this is not true. *Huston v. McCloskey*, 76 Ind. 38; *Cosgrove v. Cosby*, 86 Ind. 511.

A plat of the grounds was used in the examination of the witnesses, and was introduced in evidence. Many answers of the witnesses are unintelligible without it.

In the second instruction the court charged the jury that a railway company is not bound to fence its track so as to deprive the public, or private individuals, of the full and free enjoyment thereof, and the right to travel and use the same; that where the track can be fenced without interfering with the free use thereof by the company, or with the rights and privileges of the public or private individuals, it is the duty of the company to build and maintain fences.

This instruction is too broad in some of its statements of the rule exempting railway companies from the duty of fencing, but this is an error in favor of appellant, of which it,

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therefore, can not complain; it could by no possibility have worked injury to appellant.

A judgment will not be reversed on account of erroneous instructions, which can work no injury to the complaining party. *Hayden v. Souger*, 56 Ind. 42 (26 Am. R. 1); *Mooney v. Kinsey*, 90 Ind. 33.

The jury was charged in the fourth instruction, that if the horse was killed at a point where the company should have, but did not maintain a fence, the company is liable. The position of appellant's counsel seems to be that the only ground of liability is the want of a fence at the point where the horse entered upon the track, and that hence the instruction is erroneous in the statement that the company is liable if there was no fence at the point where the horse was injured. In this case, the objection to the instruction, if otherwise well taken, would not be available, for the reason that the uncontradicted testimony shows that the animal was killed at the point where he entered upon the track, and that he entered from grounds from which he should have been excluded by a proper fence. Cases may occur in which the position of appellant's counsel may be the correct one, but they must involve a state of facts entirely different from the facts in the case before us. What may be the proper rule, where an animal passes over a proper fence, and goes to a point where the company is not bound to fence, and is there injured or killed, we need not now decide. See *Bellefontaine R. W. Co. v. Suman*, 29 Ind. 40. As a rule of general application to all cases, appellant's position is not tenable.

It has been held that where an animal gets upon the railroad grounds and track at a point where the company should have, but has not, erected and maintained a proper fence, and is injured or killed at a point where the company is not bound to maintain such fence, the company is liable. This is a reasonable rule, in such cases, because proper fences, maintained at the point of entry, would prevent the collision and injury. In such cases, the lack of the proper fence at the

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point of entry is the cause of the injury. In the case of *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107, cited by counsel for appellant, it was said that, under the statute, it is not the place of the killing that governs the liability of the company, but it is the place of entry upon the railroad track. That statement was made with reference to the case before the court, and must be limited by the pleadings and facts of that case. There the animals entered at a point where the company was, under the statute, bound to, but had not maintained a fence. There the cause of the injury was the lack of a fence at the point of entry upon the track. Such have been the several cases in which like rulings have been made. *Toledo, etc., R. W. Co. v. Howell*, 38 Ind. 447; *Wabash R. W. Co. v. Forshee*, 77 Ind. 158. But suppose the animal enters upon the railroad at public highways, or other places where the company is not bound to maintain fences, and, unobstructed by cattle-pits or fences, passes over the track to a point where fences should be maintained, and is there injured or killed, can it be said in such a case, that it is not the place of killing, but the place of entry upon the track that governs the liability of the company?

To so hold, would be to dispense with cattle-pits, which under the statute are as essential as fences, and which, within the meaning of the statute, are fences. The road might be securely fenced on either side, and yet, without cattle-pits, animals might pass from highways and other places where fences are not required, to any part of the road, and be there injured or killed, without liability on the part of the company, because at the point of entry upon the track the company is not bound to maintain fences. See *Evansville, etc., R. R. Co. v. Barbee*, 74 Ind. 169; *Indianapolis, etc., R. R. Co. v. Bonnell*, 42 Ind. 539; *Pittsburgh, etc., R. R. Co. v. Ehrhart*, 36 Ind. 118. As applied to the facts in this case, the instruction under examination is not erroneous.

The judgment is affirmed, with costs.

Filed Sept. 26, 1884.

 Moore, Treasurer, v. Stephens, Executor.

No. 11,416.

97	271
145	190

MOORE, TREASURER, v. STEPHENS, EXECUTOR.

DECEDENTS' ESTATES.—*Testamentary Writing.—Void for want of Attestation.*

—While in life, one E. M. executed a written instrument of the following purport: "At my death, my estate shall pay to treasurer," etc., "the sum of two hundred dollars, the interest of which is to be used for the benefit of," etc. The instrument was attested by only one witness, and, after the death of E. M., was filed as a claim against her estate.

Held, that the instrument was testamentary in its character, and, as it was not attested and subscribed by "two or more competent witnesses," as required by section 2576, R. S. 1881, it could not be duly admitted to probate, and that it was, therefore, invalid as a claim against the decedent's estate, and void and inoperative for any purpose.

From the Union Circuit Court.

T. D. Evans, for appellant.

H. C. Fox, for appellee.

HOWK, J.—In this case the decision of the circuit court in sustaining a demurrer to the claim or cause of action of the appellant, the plaintiff below, is the only error assigned by him upon the record of this cause. The sufficiency of the appellant's claim, therefore, is the only question we are required to consider or decide.

The claim filed by the appellant was a written instrument, purporting to have been executed by Elizabeth Manning, of which the following is a copy:

"At my death, my estate shall pay to treasurer of the Benevolent Fund Society of the White River Annual Conference, and Church of the United Brethren in Christ, the sum of two hundred dollars, the interest of which is to be used for benefit of superannuated and worn-out preachers of the White River Conference. Given this third day of May, A. D. 1869.

my

(Signed) "ELIZABETH X MANNING.

"Witness: L. K. MANNING." mark.

With this written instrument there was filed the affidavit of the appellant, Moore, "Treasurer of the Preachers' Aid

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Fund of the United Brethren Church of White River Conference," to the effect that the claim thereto attached was just and true; that there were no offsets thereto, and that the same remained due and wholly unpaid.

This was the entire claim or complaint of the appellant. It was not averred therein that the maker of the written instrument was dead at the time the claim was filed, although by its terms it was not payable until her death. Nor was it alleged in such claim or complaint that, at the time it was filed, letters testamentary or of administration had been issued to the appellee, or to any one else, upon the estate of Elizabeth Manning, if she were dead. Technically, therefore, the appellant's claim did not state facts sufficient to constitute a cause of action. It is true that the statute regulating the filing of claims against a decedent's estate does not require a formal complaint under the ordinary rules of pleading; but it is also true that enough facts should be stated to show, *prima facie*, at least, the liability of the estate for the payment of the claim. *Huston v. First Nat'l Bank*, 85 Ind. 21.

But passing these objections to the appellant's claim, we come to the consideration of the main question in the case, does the written instrument constitute a valid claim against the estate of Elizabeth Manning, deceased? We are of opinion that this question must be answered in the negative. The instrument is not the contract of Elizabeth Manning, that she will do any act, or pay the sum of money therein mentioned. It contained no admission of her indebtedness to the treasurer or the society mentioned therein, and furnished no evidence of any such indebtedness. It was simply an attempt on her part to dispose of two hundred dollars of her estate after her death. The instrument was, therefore, testamentary in its character, but it was not executed with the forms and solemnities required by our statute in the execution of a will. Section 2576, R. S. 1881. As the instrument was attested and subscribed by only one witness, it was void and inoper-

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ative as a will. *Patterson v. Ransom*, 55 Ind. 402; *Potts v. Felton*, 70 Ind. 166.

When a written instrument, on its face and in its true character, is merely a will, but has not been properly attested to give it validity as a will, the fact that it does not appear to have been revoked during the maker's life, will not render it valid after his death. *McCarty v. Waterman*, 84 Ind. 550, and cases cited. Until such an instrument has been duly admitted to probate, it can neither operate to vest or establish, nor be used as evidence of any right claimed thereunder. *State, ex rel., v. Joyce*, 48 Ind. 310; *Pitts v. Melser*, 72 Ind. 469.

We conclude, therefore, that the written instrument, filed by the appellant as a claim against the estate of appellee's testatrix, was testamentary in its character, that it was not attested and subscribed by "two or more competent witnesses," that it had never been, and could not be, duly admitted to probate, and that, for these reasons, it was invalid as a claim and wholly inoperative for any purpose.

The demurrer to the claim was correctly sustained.

The judgment is affirmed, with costs.

Filed Sept. 19, 1884.

 No. 11,605.

SMITH ET AL. v. SMITH ET AL.

DRAINAGE.—*Docketing Petition.*—*Practice.*—*Diligence.*—*Waiver.*—A petitioner for drainage, under sections 4273–4284, R. S. 1881, and amendments thereto, should fix and note on his petition a day for docketing the same; and where the court, without such endorsement, and without a finding that proper notice had been given, orders the same to be docketed, the proceedings are irregular, but if not objected to within three days after the petition is docketed, the irregularities are waived unless excuse for the delay is shown.

SAME.—*Report of Commissioners.*—*Remonstrance.*—A report of commissioners of drainage need not state when or where they met, and a statement in the remonstrance, that they "did not meet at the time and place" fixed by the court, is too indefinite.

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SAME.—No report is required as to lands not affected by the proposed work, though such lands be mentioned in the petition.

SAME.—*Remonstrance.—Practice.*—A remonstrance which presents no material question may be struck out on motion.

From the Huntington Circuit Court.

T. G. Smith, for appellants.

B. M. Cobb and *C. W. Watkins*, for appellees.

HAMMOND, J.—Appellees have filed a motion to dismiss the appeal in this case for the alleged insufficiency of the assignment of errors. But as they have not in any manner pointed out any defect in the assignment of errors, their objections thereto must be regarded as waived.

The appeal is from proceedings, upon the appellees' petition, establishing a ditch under the act of 1881 and the amendments of 1883, regulating such proceedings in circuit and superior courts. Sections 4273 to 4284, R. S. 1881, Acts 1883, pp. 173 to 182. Appellees' petition was filed May 14th, 1883, but they did not "fix and note thereon the day set for docketing thereof," as required by section 3 (4275), as amended by section 2 of the act of 1883. The court, on June 7th, 1883, without finding that notice had been given as required by said amended section 3, made an order placing the petition on the dockets of the court. On the 12th of the same month, there was a finding by the court that proper notice had been given of the petitioners' intention to present the petition, and an order was entered referring such petition to the commissioners of drainage, fixing a time and place for their meeting to discharge the duties required of them by law, and directing them to report at the following term of court. At the ensuing term, being the October term, 1883, the appellants, prior to the filing of the commissioners' report, moved the court to dismiss the petition and to set aside the proceedings thereon for the reason that appellees had not fixed and noted on such petition any day for docketing the same. This motion was overruled, appellants excepted, and this is the first alleged error complained of.

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The order of court, directing the petition to be placed on docket, was irregular for the want of an endorsement on the petition fixing the time for such docketing. It was also irregular to order it to be docketed without first finding that notice had been given as provided by statute. The objections to these irregularities, if they had been offered at the proper time, would have been well taken. But the appellants were too late in presenting their objections, especially as no excuse was shown for their delay. It is provided by amended section 3, *supra*, that "Every person owning land shall have three days after said petition is docketed to file with said court any demurrer, remonstrance, or objection he may have to the form of said petition. * * * All objections to the petition, * * * not made within said three days, shall be deemed waived."

After the petition was docketed, five days elapsed before it was referred to the commissioners of drainage. By the order of reference the commissioners were required to meet to perform their duties with regard to the petition at a time named in vacation before the following term of court. Now, after they had performed their work, except as to the mere formality of presenting their report to the court, to permit the appellants to appear and make objections to the petition which should have been presented within three days after it was docketed, without showing cause for the delay, would not only be in direct violation of the statute, but would encourage negligence and procrastination in legal proceedings inconsistent with the due administration of the law.

Amended section 8 of the act under consideration (Acts 1883, p. 179) provides that the "collections of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessment of benefits and injuries, but such judgment shall be conclusive that all prior proceedings were regular and according to law."

The irregularities complained of and attempted to be

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reached by appellants' motion to dismiss the petition, and to set aside the orders docketing and referring the same to the commissioners of drainage, were such as would not render the proceedings void, but were cured by the judgment confirming the assessments. And we think, also, that appellants' failure to present their objections to such irregularities within the time limited by statute must be regarded as a waiver of such objections. There was no error in overruling the motion to dismiss the petition and the proceedings thereon.

At the said October term of court, namely, on November 10th, 1883, the commissioners of drainage filed their report showing that they had personally inspected all the lands described in the petition and all other lands liable to be affected by the proposed work; that, in their opinion, the proposed drainage would be of public utility, would benefit a certain described highway, and also benefit the public health, and that the cost of its construction would be less than the benefits derived therefrom. They estimated the cost of the work at \$1,000. They also estimated the benefits and injuries to the several tracts of land affected by the proposed work, showing that there would be no injuries, and that the aggregate amount of benefits would be \$1,103. The report gave the termini and route, location and character of the proposed method of drainage, and fixed the same by metes and bounds, etc. The commissioners attached to their report their affidavit, to the effect that they had each personally examined each tract of land assessed for benefits and damages, and the whole route of the proposed work, and that such drain was of sufficient capacity to carry, without overflowing, all the water which flowed or should flow along such route in ordinary stages; that no other lands than those described in their report would be either benefited or damaged by the construction of the proposed work; that all statements in their report were true and correct; and that all assessments of benefits and injuries set forth therein were correct, just, fair and

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equitable. The report and affidavit followed, substantially, the forms prescribed and declared to be sufficient in all cases where they are applicable. Section 4284, R. S. 1881.

The appellants' lands were embraced in the assessments of benefits. They remonstrated against the report of the commissioners of drainage on the ground that the report was not according to law, specifying, as their objections thereto, that it failed to show affirmatively that the commissioners met at the time and place fixed by the court, and averring that they did not so meet; that they did not report on October 15th, 1883, the day fixed by the court for that purpose; that they made no report as to two tracts of land described in the petition; that the report did not find whether or not the proposed drainage was practicable, nor whether it would benefit any public highway in Huntington county, nor whether the costs, damages and expenses would be less than the benefits; that it did not determine the best and cheapest method of drainage, and did not assess the benefits or injuries to each separate tract of land to be affected by the proposed work, nor give any full or sufficient description of the lands assessed.

The form prescribed by the Legislature, and declared to be sufficient where applicable, does not require the commissioners to state in their report that they met at the time, and place fixed in the order of court. It was their duty to meet substantially at the time and place thus designated, and in the absence of proof to the contrary, the presumption would be that they did so meet. The averment in the remonstrance, that they did not meet at the time and place prescribed in the order, was too general. It tacitly admitted that they met at some time and place, and these should have been stated, so that the court could determine whether the discrepancy between the actual time and place of meeting, and the time and place fixed in the order of court, was material.

Appellants were mistaken in alleging that the commissioners were required to report on October 15th, 1883. They

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were required to report at the next term of court after the petition was referred to them. The record shows that they did report at that term.

The law requires the commissioners of drainage to examine and report as to all lands affected by the proposed work, but as to lands not so affected, no report is required, even though such lands are described in the petition.

Other objections to the report of the commissioners, as specified above, are shown by the report itself not to have been well assigned.

The remonstrance above mentioned was struck out by the court on appellees' motion. This ruling is complained of, but we think it was correct. The objections to the report of the commissioners, specified in the remonstrance, were, with one exception, as to matters of form in the report, and, so far as material, were at variance with the report, and were, therefore, not well taken. In the exception referred to there was an attempt to aver that the order of court as to the time and place of the meeting of the commissioners was not complied with, but this averment, as we have seen, was not sufficiently specific to raise a material issue.

Other remonstrances were filed by the appellants to the report of the commissioners, and the issues thus made were tried by the court, resulting in a finding and judgment confirming the assessments. Appellants' motion for a new trial was filed and overruled, but no question upon this ruling is made in the appellants' brief.

The judgment should be, and accordingly is, affirmed, with costs.

Filed Sept. 27, 1884.

 Browning *et al.* v. McCracken.

No. 11,580.

BROWNING ET AL. v. MCCRACKEN.

DECEDENTS' ESTATES.—*Appeal.*—*Statute Construed.*—A widow applied for an order upon the administrator of her deceased husband, requiring him to pay to her the proceeds of real estate sold to make up to her a deficit of the \$500 allowed to her by law, making parties creditors claiming the fund by reason of judgment liens. The administrator, by leave, paid the money into court, and was thereupon discharged from further costs, and as against the creditors it was, after further proceedings, ordered that the clerk pay the money to the widow.

Held, that an appeal in such case is governed by R. S. 1881, sections 2454 and 2455, which require an appeal bond within ten days, and a transcript filed within ten days thereafter.

From the Morgan Circuit Court.

G. A. Adams and *J. S. Newby*, for appellants.

J. H. Jordan and *O. Matthews*, for appellee.

ZOLLARS, J.—Robert McCracken died intestate in March, 1877, the owner of personal and real property, and left, surviving, children, and appellee, as his widow. James McCracken was appointed administrator of his estate. The personal property, amounting to \$196, was taken by the widow as a part of the \$500 allowed her by law. Prior to the death of Robert McCracken, appellees Browning, Sloan and Harper had recovered judgments against him which were liens upon his real estate. After his death one-third of the real estate was set off to the widow. Subsequent to this, the administrator sold the other two-thirds of the real estate, and received the money therefor. After the payment of the expenses of the last sickness, and the costs of administration, he had left in his hands \$304 of the proceeds of the sale of the land. The widow demanded this, upon the claim that she was entitled to it to make up the balance of the \$500 allowed her under the law. The judgment creditors disputed this claim, objected to the payment to her by the administrator, and claimed that they were entitled to it. The administrator refusing to pay it to the widow, she instituted this proceed-

97	279
139	249
97	279
147	614
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150	539

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ing against him, making the judgment creditors parties. The administrator answered the facts, substantially, as above stated, and asked that he might be allowed to pay the money into court, and be discharged from further costs. This the court ordered to be done, and the money was so paid over. Demurrers having been sustained to the answers of the judgment creditors, and they declining to amend or answer further, the court ordered the clerk to pay the money to the widow, appellee. From this order appellants appeal. The administrator, having been served with notice of the appeal, and not having declined to join therein, must be regarded as one of the appellants.

We are met at the threshold with a motion by appellee to dismiss the appeal, because not taken in the manner and within the time prescribed in sections 2454 and 2455, R. S. 1881. These sections provide that any person considering himself aggrieved by any decision of a circuit court, or a judge thereof in vacation, growing out of any matter connected with a decedent's estate, may prosecute an appeal to this court upon filing a proper appeal bond with the clerk below within ten days after the decision complained of is made, and filing the transcript here within ten days after the filing of the bond.

The order appealed from was made on the 18th day of December, 1883; a bond was filed on that day, but the record was not filed here until the 7th day of April, 1884. The position of appellee, which appellants combat, is that appellants' right of appeal is governed by the above sections, and that hence the appeal was taken too late. If the right of appeal is governed by these sections, the appeal was not in time, and must be dismissed. *Taylor v. Burk*, 91 Ind. 252; *Bake v. Smiley*, 84 Ind. 212; *Seward v. Clark*, 67 Ind. 289; *Bell v. Mousset*, 71 Ind. 347.

We think that the order appealed from is a decision of the circuit court growing out of a matter connected with the decedent's estate. We need not, and do not, now decide what

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the rights of appellee are as against the judgment creditors, but in a proper case, under the statute of 1852, and the present statute, the widow was and is clearly entitled to the \$500. Under these statutes it was and is the duty of the administrator, in a proper case, to give it to her, and if need be, out of the proceeds of the sale of real estate. This is a duty that he is required to perform before, and in order that there may be, a final settlement of the estate he represents. If he refuse to do so, the widow may apply to the court for an order to compel the performance of the duty. The court has the general control and supervision of the estate and the administrator, and may direct and control him in the performance of his duties.

The application in this case is in the form of a complaint, but it is, in substance, an application to the court for an order upon the administrator to coerce the performance of the duty of paying over to the widow the money which she claims to be entitled to under the law. We know of no reason why the court might not, in a proper case, make such an order without a written application.

The fact that the administrator was allowed to pay the money into court, and the contest proceeded as between the widow and judgment creditors, did not render the decision any less a decision, growing out of a matter connected with the decedent's estate.

The proceeding is not one provided for by the civil code, but is a special and necessary mode of controlling the action of administrators, and thus expediting the settlement of estates. Common observation shows how necessary it is to close up estates in as speedy manner as possible. For this purpose the statute making a short limit upon appeals was enacted. To exempt matters of this kind from its operation would be to thwart its purpose, and postpone the settlement of estates.

The cases of *Rusk v. Gray*, 74 Ind. 231, and *Hillenberg v. Bennett*, 88 Ind. 540, cited by counsel for appellants, are not

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controlling here, nor are they in conflict with the conclusion we have reached in this case. The holdings in those cases were that, as the actions were authorized by the civil code, they should be governed by that code as to the time for appeal to this court.

The appeal in the case before us, not having been taken within the time prescribed by the above sections of R. S. 1881, must be, and is, dismissed, at the costs of appellants.

In their brief appellants ask us, upon an affidavit attached, to make an order granting an appeal, in the event that we reach the conclusion that the present appeal was not taken in time. When the appeal is dismissed, the case is not before us. If such an order is desired, a formal and proper application must be made, and notice given to appellee.

Filed Sept. 27, 1884.

No. 11,562.

CITY OF EVANSVILLE v. WORTHINGTON.

NEGLIGENCE.—*Complaint.*—*Demurrer.*—*Motion.*—Where the complaint, in an action for the recovery of damages resulting, as alleged, from the negligence of the defendant, charges such negligence and consequent damages in general terms, and the defendant desires to object thereto for the want of certainty, such objection can not be made available by a demurrer for the want of facts, but only by a motion to make the charge more specific.

PRACTICE.—*Evidence.*—*Excessive Damages.*—*Supreme Court.*—Where the evidence is conflicting, the verdict will not be disturbed by the Supreme Court on what might seem to be the weight of the evidence; nor will the judgment be reversed by the Supreme Court, on the ground of excessive damages, unless they appear at first blush to be grossly excessive.

From the Vanderburgh Circuit Court.

J. B. Rucker, for appellant.

C. L. Wedding, for appellee.

Howk, J.—The first error complained of by the appellant, the defendant below, is the overruling of its demurrer to appellee's complaint.

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In his complaint, the appellee alleged that there was a public street or highway in the city of Evansville, known as First street, leading from the upper to the lower part of such city, which street the appellant was bound to keep in repair; that the appellant negligently suffered and permitted such street and the sidewalk, on the eastern side thereof, between Pine and Ingle streets, to be and remain out of repair, and suffered and permitted "deep holes, high points and corners to be and remain in, along and upon such sidewalk and street," on and for a long time prior to May 15th, 1883, with notice thereof, and especially near the crossing of Pine street; that the appellee, on the 13th day of May, 1883, while lawfully travelling along and upon such street and sidewalk, between Pine and Ingle streets and near the crossing of Pine street, "was hurt, his leg injured and crippled, and he made sore, lame, sick and disabled from carrying on his work as a carpenter, and rendered unable permanently to do any manual labor, lost five months' time, suffered great pain of body and mind, incurred doctors' and medical bills, and was otherwise injured and damaged, all without any fault or negligence on his part, but by reason of said defendant's negligence as aforesaid." Wherefore, etc.

In discussing the question of the alleged insufficiency of the appellee's complaint, the appellant's counsel says: "Admitting the allegations of the amended complaint as true, which we do by demurrer, it does not state such facts as would justify a recovery thereon, for the reason that it does not state how the injury occurred,—whether the deep holes, high points and corners caused said injury or not. Indeed, for aught that appears in the complaint, he may have been injured by an obstruction upon the sidewalk, and not from any defect therein. He does not charge, that he was injured by stepping into said holes, or striking against said points or corners, or by falling upon said sidewalk, and the failure to do so, we insist, makes the complaint bad, and the demurrer should have been sustained."

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This is the entire argument of the appellant's counsel, in regard to the alleged insufficiency of appellee's complaint. It seems to us, that the complaint can hardly be regarded as a model of good pleading, and that it is open to some of the objections pointed out, in argument, by the appellant's counsel. It is well settled, however, by the decisions of this court, that such objections to a complaint, or other pleading, can not be reached or made available by a demurrer thereto, for the want of sufficient facts. Where, in an action for the recovery of damages resulting from the alleged negligence of the defendant, the complaint contains a general averment of such negligence, objections that such averment is defective or uncertain can not be made or presented by a demurrer for the want of sufficient facts, but only by a motion to make more specific. *Pennsylvania Co. v. Sedwick*, 59 Ind. 336; *Jameson v. Board, etc.*, 64 Ind. 524; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134); *Nowlin v. Whipple*, 79 Ind. 481.

In the case in hand, the appellee alleged with sufficient certainty that the injuries, of which he complained, were received by him without his fault or negligence, by and through the appellant's negligence in permitting one of its public streets to be and remain out of repair; but he failed to aver in what particular manner he received his injuries. If it was important to the appellant that the complaint should have shown the manner in which appellee received his injuries, it should have moved the court for an order requiring him to make his complaint more specific in that particular. But it can not be held that the complaint was bad on demurrer, for the want of sufficient facts, merely because it failed to show the particular manner in which appellee was injured. The court did not err, we think, in overruling the demurrer to the complaint.

The only other error, assigned by the appellant, is the overruling of its motion for a new trial. The causes assigned for such new trial were, that the verdict of the jury was not sustained by the evidence and was contrary to law, and that the damages assessed were excessive. Appellant's counsel has

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elaborately discussed the question of the sufficiency of the evidence to sustain the verdict. It is not necessary, nor would it be profitable, for us to follow the learned counsel in his discussion of this question and attempt to refute his argument. It will suffice for us to say that there is evidence in the record which tends to sustain the verdict of the jury on every material point in issue. The questions for trial in the cause were questions of fact, and, while the evidence was conflicting, it is manifest from their verdict that the jury believed, as they had the right to do, the appellee's evidence in preference to that of the appellant. In such a case, it is settled by a long line of decisions in our reports, that this court will not disturb the verdict, nor reverse the judgment, upon what might seem to be the weight of the evidence. *Cornelius v. Coughlin*, 86 Ind. 461; *Beck v. Bundy*, 92 Ind. 145; *Deputy v. Page*, 92 Ind. 291; *Town of Princeton v. Gieske*, 93 Ind. 102.

So, also, the amount of the plaintiff's damages, in such a case as this, is a question for the jury, and where their verdict has met the approval of the trial court, the judgment could not be reversed on the ground of excessive damages, unless they appeared at first blush to be grossly excessive. From the evidence in the record, we can not say that the appellee's damages in this case were excessive. *Town of Westerville v. Freeman*, 66 Ind. 255; *Farman v. Lauman*, 73 Ind. 568.

We find no error in the record of which the appellant can complain. The judgment is affirmed with costs.

Filed Sept. 18, 1884.

No. 8889.

SEAGER v. AUGHE ET AL.

FRAUDULENT CONVEYANCE.—*Complaint.*—*Vendor and Vendee.*—*Notice.*—

A complaint to set aside a conveyance as fraudulent, which fails to allege that the purchaser participated in the vendor's fraudulent purpose, but in lieu thereof avers that such purchaser agreed to pay the consideration of such purchase to a third party, and was notified of the

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133	300
97	285
151	538

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plaintiff's claim and of the vendor's fraudulent purpose before the payment of the purchase-money, is not good unless it also avers that such third party had not accepted the promises of such purchaser, or that the same had been rescinded, in order to show that the purchaser was still indebted to the vendor.

SUPREME COURT.—*Evidence.—Record.*—Where the complaint is not in the record, the court can not say that the evidence supported it, and, therefore, can not say that a finding for the defendant was contrary to the evidence.

From the Tippecanoe Circuit Court.

J. N. Sims, for appellant.

A. E. Paige and *S. O. Bayless*, for appellees.

BEST, C.—The appellant brought this action against Samuel Aughe and Jesse Aughe, to set aside as fraudulent certain conveyances of real estate made by said Samuel to said Jesse, and to subject the same to the payment of a certain judgment the appellant had recovered against said Samuel Aughe.

The action was commenced in Clinton county. The complaint originally consisted of a single paragraph, to which a denial was filed. The issue was twice tried by a jury, each of which failed to agree, after which the venue was changed to the Tippecanoe Circuit Court. An amended complaint, consisting of three paragraphs, was filed. A demurrer was sustained to the third, the others were denied, a trial had, a finding made, and a judgment rendered for the appellees. A motion for a new trial, on the ground that the finding was contrary to the evidence, was overruled, and the rulings upon this motion and upon the demurrer are assigned as error. These will be noticed in the inverse order of their statement.

The third paragraph of the complaint averred, in substance, that on the 16th day of January, 1877, said Samuel, who then owed the appellant more than \$1,000 and who was insolvent, conveyed to said Jesse by warranty deed, in which his wife joined, lots nine (9) and ten (10), in John Pierce's First Addition to Frankfort, of the value of \$6,000, "in consideration of an agreement then and there made by said Jesse

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with said Samuel, to pay to the Farmers Bank of Frankfort, a then unmatured note, of which the said Samuel was one of the makers, for about the sum of three thousand and five hundred and thirty dollars and sixty-five cents;" that said Samuel made said conveyance for the purpose of defrauding his creditors; "that afterwards, on the 1st day of March, 1877, the plaintiff's note being unpaid, he fully notified the said Jesse of its existence and asked him to secure the same, which he refused to do; that at the time he so notified the said Jesse of the existence of said note, the latter had not paid any part of the purchase-money of said property, and did not pay any part of said purchase-money for more than nine months thereafter," etc.

According to the averments of this paragraph, said Jesse was a purchaser for value, and as it is not averred that he participated in said Samuel's fraud, or knew of his purpose, the conveyance can not be deemed fraudulent as to him, unless the notice given him of the existence of the appellant's claim before the actual payment of the purchase-money rendered it so. Ordinarily, when a vendor fraudulently conveys his property for value, and notice of such fraudulent intent is given the purchaser before payment of the purchase-money, such purchaser is chargeable with the fraudulent intent of his vendor, and such transaction is deemed fraudulent, at least, to the extent of the unpaid purchase-money. *Parkinson v. Hanna*, 7 Blackf. 400; *Rhode v. Green*, 26 Ind. 83.

This rule, however, only obtains where the purchase-money remains unpaid, *i. e.*, where it remains due from the vendee to the vendor. Where the vendee has paid it to the vendor, or has obligated himself to pay it to another, it can not apply, as in either case nothing is due the vendor, and, consequently, nothing remains for his creditor. This being the rule of law, a creditor, who seeks to subject the unpaid purchase-money to the satisfaction of his claim, must show that it is due his

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debtor. Unless this is shown the unpaid purchase-money can not be subjected to such claim, nor can such conveyance be deemed fraudulent. Tested by these rules, the paragraph in question was insufficient. The presumption undoubtedly is that unpaid purchase-money is due the vendor, and had nothing else been averred, the paragraph, in this respect, would have been sufficient; but it was averred that the purchaser agreed to pay a note of \$3,530.65 to the Farmers Bank of Frankfort. This promise obligated him to make such payment, and rendered him personally liable to the bank. This promise the bank could enforce, and its acceptance of the promise exonerated him from any obligation to the vendor. There is no presumption that such promise was not accepted by the bank or had been rescinded by the parties. It must, therefore, be deemed a binding obligation, and, thus considered, the vendee can not be regarded as the vendor's debtor. Since the appellant alleged the purchaser's promise to pay the consideration of such conveyance to another, he should also have alleged that such promise had not been accepted, or had been rescinded by the parties before notice of acceptance, in order to show that notwithstanding such promise the purchaser was the vendor's debtor. The purchaser, by a simple notice, could not be compelled to pay the purchase-money twice, and it was, therefore, incumbent upon the creditor to show that the purchaser was not legally bound to pay the bank. For want of such averments the paragraph was insufficient, and the demurrer was properly sustained.

The motion for a new trial was based upon the ground that the finding was contrary to the evidence. The first and second paragraphs of the complaint upon which the cause was tried are not in the record, and in their absence we can not say that the evidence supported the material averments of either paragraph. Without them this reason for a new trial presents no question whatever.

This disposes of the only questions in the record, and as no error appears, the judgment should be affirmed.

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PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed June 21, 1884. Petition for a rehearing overruled Oct. 16, 1884.

No. 11,308.

FICKLE ET AL. v. SNEPP.

WILL.—Schedule.—Identification.—A schedule signed by a witness to a will can not be regarded as part of the will, unless it is in some way identified.

SAME.—Promissory Notes.—Identification in Will.—Where notes, payable at the death of the testator, were folded up with his will and remained in his possession at the time of his death, and were clearly and fully identified, they formed part of the will.

SAME.—Delivery of Notes.—It was not important that there had been no delivery of the notes. Their existence as a writing of a character that could be incorporated in the will, and their identification, satisfy all requirements.

DECEDENTS' ESTATES.—Claims Against.—Assets.—Claims against an estate may be allowed without inquiring whether they belong to a preferred class, or whether there are assets to pay them.

SAME.—Legacy.—Probate Jurisdiction.—Payment of Debts.—Administrator.—A claim for the allowance of a legacy may be presented in the court having probate jurisdiction as a claim against the estate, but if the payment of all debts against the estate is not alleged, some reason for appealing to the court for the establishment of the legacy must be shown, and also some wrong on the part of the administrator.

From the Shelby Circuit Court.

N. B. Berryman, R. W. Wiles, T. B. Adams and L. T. Michener, for appellants.

B. F. Love, A. Major and H. C. Morrison, for appellee.

ELLIOTT, C. J.—The complaint of the appellee was filed against the administrator with the will annexed, of the estate of John Snepp, deceased, and seeks to enforce payment of a legacy alleged to have been bequeathed to the claimant.

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A note is set forth in the complaint, signed by the testator, and containing, among others, the following provision: "On the day of my death I promise to pay Joseph H. Snepp seventeen hundred dollars." This note was one of a series of five, signed by the testator, and made payable to his children. They were folded up with the will, and were in the testator's possession at the time of his death. It is averred that "a will was duly executed and probated," and that "in item first of said will the said testator did direct that his executors should pay all of his just debts, including whatever might be due for principal and interest upon five notes which he had at the time of the, execution of the will made to five of his children, to wit, his daughter Elizabeth, his daughter Maria, his sons William M., Joseph H. and David J. Snepp, for the purpose of making all his children equal in their advancements out of his estate." In the will, which is made part of the complaint, is the following:

"Item 1st. I direct that all of my just debts, including whatever may be due for principal and interest upon five notes, which I have this day made to five of my children, viz., Elizabeth, Maria, William M., Joseph H. and David J., for the purpose of making all my children equal in their advancements out of my estate, which said notes are payable at my death."

Following this is a provision for the payment of funeral expenses and for the sale of property, and then comes this provision: "I direct that the residue of my estate, which shall then remain in the hands of my executors, shall be equally divided among my children, viz., Elizabeth Hoskins, Maria Runshe, May J. Fickle, William M. Snepp and David J. Snepp, share and share alike, provided that if I shall at any time hereafter have to pay any money for any of my sons-in-law by reason of my liability therefor, the same shall be taken as part of the share in my estate of such daughter for whose husband I shall pay the same; and provided, also, that if any of my said children shall die before I do, then the share of

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such deceased child shall be paid to their legal heirs, issue of their bodies.”

Following the signature of the testator and the attestation clause is a list of notes and amounts, to which is appended the following statement, signed by one of the subscribing witnesses: “The above is a statement of the notes made by John Snepp to five children for sums of money to make them all equal in advancements with May J. Fickle.”

The schedule signed by the witness can not be regarded as part of the will. It is not in any way identified; there is not the slightest reference to it in any part of the instrument. It is true that schedules or other papers may be considered in connection with the will when they are plainly identified, but there is here no identification, either in express words or by fair implication; hence the paper can not be deemed part of the will. 1 Jar. Wills (5th Am. ed.), 37, 38, auth. n.; 1 Redf. Wills, 261, 262. We applied in *Pulse v. Miller*, 81 Ind. 190, the general principle which governs here to contracts, and the reason for its application to wills is stronger than that which operates in cases of contracts.

The notes which the testator signed at the time he executed the will are clearly and fully identified. There can not be the slightest doubt as to their identity. They are, therefore, to be regarded as a part of the will. This question was examined with great care and discussed with much ability in *Newton v. Seaman's Friend Society*, 130 Mass. 91; S. C., 39 Am. R. 433. In that case it was said by GRAY, C. J., in delivering the opinion of the court: “If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to pro-

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bate as such." The case from which we have quoted is also reported in 2 Am. Prob. Cases, 18, and copious notes are added giving many valuable cases. These authorities so fully settle the question that a discussion would be profitless. And we content ourselves with adding to the cases cited by the reporters the case of *Fosselman v. Elder*, 98 Pa. St. 159, and our own case of *Fesler v. Simpson*, 58 Ind. 83.

The appellant's counsel argue the case on the theory that as the notes were not delivered they were not in existence. This is a fundamental error. The notes as papers, as instruments of writing, were in existence, and as such they were fully identified by the will. It was not necessary that the notes should have been made effective by delivery; had that been so, there would have been no necessity for any will; the notes would have been in themselves effective without a will. The question is not whether the notes existed as valid promises to pay money, but whether they were in existence as papers or instruments capable of identification and capable of forming, by way of reference, part of the will of the testator. It matters not, as all the cases show, whether the paper did or did not create a binding obligation. If it had an existence as a writing and was of such a character as that it could be incorporated in the will, then the requirements of the law are satisfied. This is the rule declared in *Fesler v. Simpson*, *supra*.

In a supplemental brief counsel for appellant argue that it is not shown that the administrator had money in his hands sufficient to pay the legacy, and that for this reason the complaint is bad. The complaint does aver, that "there is now in the hands of the administrator the sum of \$—— belonging to said estate, that the whole amount of said note is unpaid, and that by reason of the premises, and under the provisions of the will, he is entitled to have allowed him by said administrator, and to be paid out of the estate, the sum of \$2,712.86." We think that in view of the liberal rules of pleading that obtain in claims against estates, and in view

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of the rule that the remedy for uncertainty is by motion, the complaint must be upheld against an attack by demurrer. The practice of leaving blanks in a pleading is not a commendable one; on the contrary, it is one which good pleaders abhor. But we do not think it necessary for the claimant to show that there are assets sufficient to pay his claim before he can obtain an allowance. It is one thing to obtain an allowance and another thing to obtain a direction for the payment of the claim.

Claims may be allowed without inquiring whether there are assets sufficient to pay them, or whether they are or are not members of a preferred class. The allowance comes first; the direction as to payment comes afterwards. The statute fixes the order of priority of claims, and this the courts can not change. *Jenkins v. Jenkins*, 63 Ind. 120. All that a complaint need do is to state facts showing a right to an allowance; it need not anticipate defences, nor show the existence of assets.

The English rule is that a legacy can not be recovered in an action at law, but may be enforced by a suit in equity. The American cases are not harmonious, but there are very many in favor of the rule that an action at law will lie for the collection of the legacy. 3 Williams Ex. (6th Am. ed.), 2046, auth. n. Under our statute it can not be important to inquire whether the remedy is at law or in equity, for if facts are stated warranting a recovery, a recovery will be awarded, no matter whether the case made is cognizable in equity or at law. The object of our statute governing the settlement of decedents' estates is to keep all matters concerning the estate in the court having probate jurisdiction, and we think it was proper to institute this proceeding in the court of probate jurisdiction, and to give it the form of a claim against the estate.

We are referred to the cases of *Crist v. Crist*, 1 Ind. 570, *Highnote v. White*, 67 Ind. 596, and *Gould v. Sleyer*, 75 Ind. 50, as sustaining appellant's contention. The two cases first

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named were for the recovery of specific things, and the rule applicable in such cases is very different from that which prevails where all that is sought is to establish a claim to a legacy by having it allowed. *Branch v. Holcraft*, 14 Ind. 237, and *Rapp v. Matthias*, 35 Ind. 332, cited in *Highnote v. White*, *supra*, do not touch the question here under discussion. In *Gould v. Steyer*, *supra*, the action was not against the administrator, but against the legatees, and the language used in the opinion is applicable to such a case as that, but not to a case like this. The reason that *Gould v. Steyer*, *supra*, is well decided, is because as long as the matters of the estate are unsettled, the administrator, and not the heirs or legatees, must sue, and this is what is decided in *Fillingin v. Wylie*, 3 Ind. 163. The language in *Gould v. Steyer*, *supra*, must be limited to the facts of that case. We do not find any case warranting the conclusion that a legatee is bound to aver that the administrator has assets, or that he is in all cases bound to wait until the estate is finally settled and the administrator discharged before he can have the amount of the legacy established by an order of allowance, and we are satisfied that there is no reason for such a conclusion. The cases cited by the appellants all agree that it is the duty of the administrator to pay the legacy; and if this be true, it would seem clear that this duty should be performed while the representative capacity existed.

There is a defect in the complaint which compels a reversal. The will fixes the right to the legacy, and makes it the duty of the administrator to pay it. *Heady v. State, ex rel.*, 60 Ind. 316, *vide* p. 323. But he is not bound to pay it until all debts of the estate have been paid. Story Eq., section 555. He may, therefore, rightfully delay payment, and in doing this does no wrong, and if he does no wrong, then he is not liable to an action. We suppose no one doubts that before an action of any character can be maintained, it must appear that the defendant was in the wrong. In this case it does not appear that there was any denial of the appellee's claim; for

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ought that appears the administrator may have fully conceded its validity. The complaint should show in such a case as this that the legatee's claim was denied by the administrator. It is upon this principle that the cases rest which hold that a demand must precede the action. 3 Wait Actions and Def. 260; 3 Williams Ex. (6th Am. ed.), 2046, auth. n. A complaint which does not show a payment of all debts must show, in some form, that there is reason for appealing to the court to establish the legacy, and must also show that there is some wrong on the part of the administrator. For the defect in the complaint pointed out by us the judgment is reversed.

Filed Oct. 10, 1884.

No. 10,795.

NEWMAN v. THE LIGONIER BUILDING, LOAN AND SAVINGS
ASSOCIATION.

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PLEADING.—Exhibits.—Building Association.—Mortgage.—A complaint by a building association to foreclose a mortgage need not exhibit a copy of its constitution and by-laws, and, if it does so, such exhibits will not be considered as part of the complaint.

SAME.—Set-Off.—Striking out.—Practice.—An answer which sets up a valid set-off should not be struck out, though it contains also much other matter which is wholly idle or surplusage.

From the Noble Circuit Court.

L. W. Welker, for appellant.

H. G. Zimmerman, L. H. Green and — *Bothwell*, for appellee.

HAMMOND, J.—Action by the appellee against the appellant to foreclose a mortgage executed by the latter to the former to secure the payment of the following obligation:

“\$500. LIGONIER, IND., February 26th, 1875.

“For value received, I promise to pay to the order of the Ligonier Building, Loan and Savings Association, of Ligonier, Indiana, five hundred dollars, eight years after date of incorporation of said association, viz., January 27th, 1874,

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upon, were filed with each paragraph of the complaint. There were also filed with the first paragraph of the complaint copies of the constitution and by-laws of the association. But copies of such constitution and by-laws were not essential to be filed with the complaint. *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310; *Wilson v. Wilson*, 86 Ind. 472; *Anderson, etc., Ass'n v. Thompson*, 88 Ind. 405. Where exhibits are unnecessarily filed with the pleading, they are not considered in determining its sufficiency. 1 Works Pr., sec. 420.

The first paragraph of the complaint is to foreclose a mortgage given to secure an unconditional obligation to pay a specified sum of money with interest, eight years after January 27th, 1874. This was due when the action was brought, and the complaint avers that it was due and unpaid.

The only objection urged to the second paragraph of the complaint is that copies of the constitution and by-laws of the association are not filed with it. But, as already observed, it was not necessary that such copies should be filed with the complaint.

It is urged by the appellant that the description of the real estate in the mortgage is so defective as to render the mortgage invalid. The real estate is described by metes and bounds, as being in Noble county, this State, commencing at a point six feet west of the northwest corner of D. C. Teat's and Allen Beal's blacksmith shop. Courses and distances are then given, so that when the starting point is ascertained there can be no difficulty in locating the property. When the blacksmith shop referred to is found, the existence of which is not disputed, the location of the real estate becomes, we would say, a work of no great perplexity. *Brown v. Anderson*, 90 Ind. 93; *Reid v. Mitchell*, 95 Ind. 397. Each paragraph of the complaint was good upon demurrer.

The third paragraph of the appellant's answer, which was struck out by the court, was as follows:

"For a third and further defence to plaintiff's complaint, defendant says that the plaintiff is indebted to him in the sum

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of eight hundred dollars, evidenced by a written share of stock in said plaintiff, the Ligonier Building, Loan and Savings Association, dated —, 1875, calling for five hundred dollars, with interest at the rate of six per cent. from said date. Defendant further says he can not more fully set out said share of stock, as he delivered the same to said plaintiff to hold to insure it that this defendant would pay all dues, fines and interest coming from him to said plaintiff, until the — day of January, 1882, at which time, if defendant had paid his dues, fines and interest, plaintiff was to deliver up to him said share of stock, and settle up with him by cancelling said mortgage and delivering to defendant said note and paying to him the balance due him in money; that defendant paid all of said dues, interest and fines, in all things according to said agreement, until the expiration of said association, on the — day of January, 1882, at which time said association ceased to exist only to settle its business, and on said day defendant demanded a settlement with plaintiff, but plaintiff refused to settle, or to deliver to defendant his said share of stock, or to cancel his said mortgage, or to deliver up said note, or to pay him the amount due him, although often requested by defendant so to do; that said sum of eight hundred dollars is justly due this defendant, and remains wholly unpaid. Wherefore defendant offers to set off any sum found due the plaintiff, and prays judgment for three hundred dollars, the balance due him, and all other proper relief.”

The averments in the above pleading as to the appellee's agreement at a certain time and upon certain conditions to cancel the note and mortgage sued upon with the appellant's stock in the appellee's corporation, may be regarded as mere surplusage.

It may be conceded that the appellee's parol agreement to accept such stock as payment of the appellant's note would be void, as being in conflict with the express conditions of said note to pay a specified sum of money at a time named; still, however, as a plea of set-off, we think the answer is

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good. It contains averments to the effect that the appellee was indebted to the appellant in the sum of \$500, with interest since 1875, on such stock, and that the same was due and unpaid.

The certificate of stock being in the hands of the appellee, the appellant was excused from filing a copy of it with his answer. If such certificate did not contain an unconditional promise to pay the appellant a specified sum of money at a certain time, or if the terms of such certificate were controlled or modified by the appellee's constitution and by-laws, the appellee should have replied by denial or by stating the facts specially. The striking out of the pleading can not be sustained on the theory that the facts therein stated might have been proved under any other paragraph of the appellant's answer.

The error in striking out the third paragraph of the answer necessitates the reversal of the judgment, and this dispenses with the consideration of other alleged errors.

Reversed, at appellee's costs, with instructions to overrule the motion to strike out the third paragraph of the answer.

Filed May 26, 1884. Petition for a rehearing overruled Nov. 14, 1884.

No. 11,116.

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INSURANCE.—*False Representations as to Liens.*—*Defence.*—In an action upon a policy of insurance against loss by fire, a paragraph of answer, wherein it is stated that the policy was issued upon the written application of the plaintiff for the insurance, in which application he falsely represented that the buildings to be insured were free from incumbrances, when, in truth, the buildings were incumbered by the lien of certain judgments, is a good defence in bar of the action.

SAME.—*Charter of Company.*—*Power to Contract.*—*Mode of Contracting.*—*Ultra Vires.*—*Waiver.*—An incorporated insurance company is the creature of its charter, and where the charter gives it power to contract, and prescribes the mode or form of making such contract, the company must

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observe the form or mode prescribed, or the contract will be void; and in such case it is not within the power of the officers or agents of the company to waive a strict compliance with the requirements of its charter.

From the Owen Circuit Court.

J. H. Fowler and A. B. Young, for appellant.

A. W. Fullerton, W. Richards, S. O. Pickens, W. W. Moffett and W. A. Pickens, for appellee.

Howk, C. J.—This was a suit by the appellant against the appellee upon a certain policy of insurance, whereby the appellee undertook and agreed to pay all loss and damage which the appellant might sustain, by reason of fire or lightning, to certain described property, not exceeding in amount the sum of \$2,350. It was alleged in his complaint, that the appellant was the owner of the insured property, and that the same was destroyed by fire, without design or gross negligence on his part, during the lifetime of the policy of insurance. The appellee answered in three paragraphs, of which the first was a general denial of the complaint, and each of the other paragraphs stated special or affirmative matters by way of defence. To the second and third paragraphs of answer, the appellant replied in three paragraphs, of which the first was a general denial, and each of the other paragraphs stated special matter in reply to a specific part only of the third paragraph of answer. The appellee's demurrers, for the want of sufficient facts, to the second and third replies, were sustained by the court, and the appellant failing and refusing to reply further to the third paragraph of answer, the court found and adjudged that the matters and things set forth in the third paragraph of appellee's answer were sufficient in law to bar the appellant's right of action on the policy of insurance described in his complaint. Thereupon, final judgment was rendered that the appellant take nothing by his suit, and that appellee recover of him its costs.

The case is before this court for the second time. *American Ins. Co. v. Leonard*, 80 Ind. 272. On the former appeal,

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it was held that the second paragraph of the defendant's answer stated a good defence to the action. But the sufficiency of the third paragraph of answer was neither considered nor decided by this court, on the first appeal. The judgment was then reversed, because of error in overruling a demurrer to a paragraph of reply, which was pleaded to the entire answer, but in fact responded to part only of the answer.

When the cause was returned to the circuit court, no change was made in either the complaint or answer; but the appellant, Leonard, filed amended replies.

In the second paragraph of its answer, the appellee alleged, in substance, that the premium notes, given by the appellant for the policy in suit, were due and unpaid at the time of the loss, and that the policy by its terms was thereby avoided. On the former appeal, this paragraph of answer was held to be a good defence, on the authority of *American Ins. Co. v. Henley*, 60 Ind. 515.

In the third paragraph of its answer, the appellee admitted its issue of the policy in suit, but averred that appellee was a mutual insurance company incorporated under the laws of the State of Illinois; that by the terms of the policy in suit, the laws constituting the appellee's charter were made a part of such policy; that in section 16 of appellee's charter, it was provided as follows: "Said company may make insurance for any term not exceeding five years, * * * in all cases where the assured has a title in fee simple, unincumbered, to the building or buildings insured and to the land covered by the same; but if the insured has a less estate therein, or if the premises be encumbered, the policy shall be void unless the true title of the assured, and the encumbrance on the premises be expressed therein." And the appellee averred that at the time of its issue of the policy in suit, the premises insured were encumbered by certain judgments, which encumbrances were not expressed in such policy, and the same was void. The appellee further alleged that the appellant made a written application to the appellee

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for such insurance; that in such application the appellant represented that the buildings to be insured were free from encumbrances; that, in truth, such buildings were encumbered by the lien of certain judgments; and that, therefore, by its terms, the policy in suit was void.

This paragraph of answer stated facts sufficient to constitute a good defence to the appellant's cause of action. In *Indiana Ins. Co. v. Brehm*, 88 Ind. 578, it was held by this court that a policy of insurance against loss by fire, issued upon a written application wherein it is falsely stated that the buildings to be insured are free from encumbrances, when in truth they were at the time encumbered by valid subsisting liens, can not be enforced. *Wood Fire Ins.*, section 112; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Cox v. Aetna Ins. Co.*, 29 Ind. 586.

The first paragraph of the appellant's reply was a general denial of the appellee's answer. The second and third paragraphs of the reply were pleaded to the third paragraph only of the answer. In the second paragraph of his reply, the appellant admitted the encumbrances on the buildings insured and on the real estate whereon such buildings were situate, as the same were stated in the third paragraph of appellee's answer, except as to one of the judgments mentioned therein, but he averred that at the time the appellee took his application for the insurance of his property, described in such application and in the policy in suit, and at the time of the issuing of such policy of insurance on the property insured, the appellee had full knowledge of all said encumbrances on the buildings insured, and on the real estate upon which such buildings were situate, such encumbrances, and each and all of them, having been fully explained and made known to the appellee by the appellant, at and before the time of his making the application for such insurance and before the issue of the policy in suit; and that the appellee, at and before the taking of appellant's application for such insurance, and at the time of issuing to him such policy of insurance, had full

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knowledge and information of the said condition of the title to such buildings insured, and to the real estate whereon the buildings were situate. And the appellant averred that at the time of his making the application for such insurance, and at the time of the issue to him of the policy in suit, the provisions and conditions of the charter, under which the appellee did business, were not made known to him; neither was such charter in any way made part of such application or policy, so that the appellant might know its provisions, and he never knew the provisions of such charter until after his barn was destroyed by fire, as alleged in his complaint. Wherefore the appellant said that the appellee was estopped from setting up any defence in this action on account of any of said encumbrances on the buildings insured or on the real estate upon which such buildings were situate, or on account of any defect in the appellant's title to such buildings and real estate.

The only difference between the second and third paragraphs of reply, which we have discovered, is one of phraseology rather than of substance. If the second reply is sufficient to withstand the appellee's demurrer, so, also, is the third reply, but not otherwise. A corporation, such as the appellee, can only transact its insurance business through its officers or its agents. If the appellee itself, through its principal officers, upon the facts stated in the third paragraph of its answer, could not make and issue a valid, legal and binding contract or policy of insurance, through an absolute want of corporate power so to do, it would seem to be clear that none of its subordinate agents or solicitors could, upon the same facts, make and issue a valid, legal and binding contract or policy of insurance; in other words, where the question is one of corporate power, if there can be no waiver by the corporation itself, acting directly through its principal officers, there certainly can not be any waiver where the corporation is sought to be charged by and through the acts of its subordinate agents or solicitors. We are of opinion, therefore, that the questions

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for decision in this case are presented as fully and as fairly for the appellant by the second paragraph of his reply, of which we have given a full summary, as by the third paragraph of his reply. The substantial difference between the two paragraphs of reply lies in the fact that while the second paragraph charges the appellee itself with full knowledge of the encumbrances on the insured property, at and before the issue of the policy in suit, the third paragraph charged such knowledge on the local and subordinate agents of the appellee, to whom the appellant made his application for, and through whom he received the policy in suit.

It will be seen from our summary of the third paragraph of answer, that the defence therein stated is based upon the alleged fact that the appellee had no corporate power to make or issue the contract or policy of insurance, declared upon by the appellant in his complaint in this case. In the case of *Head v. Providence Ins. Co.*, 2 Cranch, 127, Chief Justice MARSHALL said: "The act of incorporation is to them an enabling act; it gives them" (the corporation) "all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." So, in 1 Phillips Insurance, p. 9, it is said, that an incorporated insurance company is "the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes."

Whenever the charter of an insurance company requires that any act shall be done, and prescribes the mode in which such act shall be done, and declares that if the act be not done in the manner prescribed, the contract or policy of insurance shall be void, the company can not waive the performance of such act in the prescribed mode; for performance of any condition of the contract, fixed by law, can not be waived.

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This has been repeatedly declared to be the law in cases involving the question of double insurance. Thus, in *Couch v. City Fire Ins. Co.*, 38 Conn. 181, where the charter of the insurance company provided that "if there shall be any other insurance upon the whole or any part of the property insured by any policy issued by said company, during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, endorsed upon the policy under the hand of the secretary," it was held by the Supreme Court of Connecticut that the insurance company could not waive the performance of the act required by such provision of its charter, in the mode prescribed, and that its consent to double insurance could only be proved by the endorsement thereof upon the policy, under the hand of the secretary. To the same effect, substantially, are the following cases: *Security Ins. Co. v. Fay*, 22 Mich. 467 (7 Am. R. 670); *Blanchard v. Atlantic Mut. Fire Ins. Co.*, 33 N. H. 9; *Hutchinson v. Western Ins. Co.*, 21 Mo. 97; *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. 265; *Pendar v. American Mut. Ins. Co.*, 12 Cush. 469; *Simpson v. Pennsylvania Fire Ins. Co.*, 38 Pa. St. 250; *Fabyan v. Union Mut. Fire Ins. Co.*, 33 N. H. 203.

In the case at bar, as shown by the averment of the third paragraph of answer, the appellee had power to make contracts of insurance "in all cases where the assured has a title in fee simple, unencumbered, to the building or buildings, and to the land covered by the same; but if the insured has a less estate therein, or if the premises be encumbered, the policy shall be void unless the true title of the assured and the encumbrance on the premises be expressed therein." These were the provisions of the appellee's charter, and neither its principal officers nor its subordinate agents could waive compliance therewith. When it was alleged by the appellee, and admitted by the appellant, that there were encumbrances on

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the premises which were not expressed in the policy in suit, then, by the express terms of the law of appellee's creation and existence, the policy was void.

The appellant is in no condition, as it seems to us, to claim that the appellee is estopped by the acts and conduct of either its principal officers or its subordinate agents, from asserting and showing that the policy in suit is void. The laws of Illinois, constituting the appellee's charter, were made a part of appellant's policy of insurance. In section 2 of such charter it was provided that every person who should become interested in such company by insuring therein should be deemed and taken to be a member thereof, for and during the term specified in his policy, and no longer, "and shall at all times be concluded and bound by the provisions of this act." By accepting his policy of insurance, therefore, the appellant became and was a member of the appellee company, and, as such, was "concluded and bound by the provisions" of its charter. As such member the appellant knew, or had the means of knowing, and, therefore, was bound to know, that his policy of insurance was void, for want of corporate power in the appellee to issue such a policy. It is well settled that where both the parties to a transaction have equal knowledge, or means of knowledge, of all the facts, there can be no valid estoppel. *Greensburgh, etc., T. P. Co. v. Sidener*, 40 Ind. 424; *Long v. Anderson*, 62 Ind. 537; *Lash v. Rendell*, 72 Ind. 475; *Robbins v. Magee*, 76 Ind. 381; *Buck v. Milford*, 90 Ind. 291.

Our conclusion is, therefore, that the court did not err in sustaining the appellee's demurrers to the second and third paragraphs of appellant's reply.

We find no error in the record.

The judgment is affirmed, with costs.

Filed May 26, 1884. Petition for a rehearing overruled Sept. 19, 1884.

The Louisville, New Albany and Chicago Railway Company v. Parks.

No. 11,388.

97	307
124	277
97	307
161	708

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. PARKS.

RAILROAD.—*Negligence.—Escape of Fire.—Complaint.*—In an action against a railroad company to recover for property destroyed by fire originating from sparks emitted by a passing locomotive, a complaint averring that the sparks emitted from the smoke-stack of the locomotive were carried therefrom “into the adjoining fields of the plaintiff, and by which the same became ignited,” is a sufficient averment of negligence on the part of the defendant in permitting the fire to escape.

From the Owen Circuit Court.

G. W. Friedley, E. D. Pearson and H. H. Friedley, for appellant.

J. W. Buskirk and H. C. Duncan, for appellee.

COLERICK, C.—This action was instituted by the appellee to recover the value of certain personal property which, it was alleged, had been destroyed by fire caused by the emission of sparks from a locomotive owned and operated by the appellant.

The complaint consisted of two paragraphs, to each of which separate demurrers, assigning insufficiency of facts to constitute a cause of action, were overruled. The issues were tried by a jury, and resulted in the rendition of a judgment in favor of the appellee. The only errors assigned that have been discussed relate to the rulings of the court below on the several demurrers to the complaint.

It is insisted by the appellant that the first paragraph of the complaint was insufficient, because it failed to allege that the appellant negligently permitted the fire to escape from its right of way to the appellee’s field, where the injury complained of occurred. It averred, as to negligence, “that said railroad, in passing through the said county of Monroe, passed over and through the defendant’s farm; that on said day the said defendant had negligently permitted, where the same passed over and through the plaintiff’s said farm, and on divers other places on their said road, large quantities of

The Louisville, New Albany and Chicago Railway Company v. Parks.

hay, grass, stubble, leaves, rotten wood, and divers other kinds of litter, to accumulate along the line of their said road, by the side of and on their said track, and on each side thereof on their right of way, and all of which were dry and combustible and easily and readily fired and burned; that on said day said company, by their agents, servants and employees, run their locomotive and train of cars over that portion which runs through the plaintiff's said farm, and while said locomotive was not then and there provided with a sufficient spark-arrester or device to prevent the discharge of sparks of fire and live coals when the said locomotive was running—that the netting over the stops of the smoke-stack on said locomotive was defective, out of repair, and full of holes—by reason of which large quantities of coals of fire and large sparks of fire were emitted from said smoke-stack, and carried a long way into the said rubbish and litter which said defendant had so negligently permitted to accumulate on and by their said railroad track and on their said right of way, and into the adjoining fields of the plaintiff, and by which the same became ignited, and which fire was by the said rubbish and litter negligently communicated to the plaintiff's said field, by which the same was fired; that said fire spread over the plaintiff's field, burning and destroying, etc.; * * * that all of said damage was without any fault or negligence on the part of this plaintiff. Wherefore," etc.

It is settled in this State, by the decisions of this court, that a complaint against a railroad company for damages resulting from an escape of fire from its right of way, must aver negligence on the part of the company in permitting the fire, if started on its right of way, to escape therefrom to the adjoining premises. *Pittsburgh, etc., R. W. Co. v. Culver*, 60 Ind. 469; *Pittsburgh, etc., R. W. Co. v. Hixon*, 79 Ind. 111; *Louisville, etc., R. W. Co. v. Spenn*, 87 Ind. 322; *Louisville, etc., R. W. Co. v. Ehlert*, 87 Ind. 339; *Indiana, etc., R. W. Co. v. Adamson*, 90 Ind. 60; *Indiana, etc., R. W. Co. v. McBroom*, 91 Ind. 111.

The Louisville, New Albany and Chicago Railway Company v. Parks.

Although the averments in the first paragraph of the complaint in this case, so far as they charge negligence in permitting the fire to escape from the right of way of the appellant to the field of the appellee, were not stated with the exactness and precision which characterize skilful or careful pleading, yet, we think, it sufficiently appears therefrom that the negligence referred to was intended to be imputed to the appellant. If the averments, in this respect, were indefinite and uncertain, it was the privilege and right of the appellant, by motion, to have had them made definite and certain. *Brookville, etc., T. P. Co. v. Pumphrey*, 59 Ind. 78 (26 Am. R. 76). It will be observed that it is averred in this paragraph of the complaint that the sparks which were emitted from the smokestack of the locomotive were carried therefrom "into the adjoining fields of the plaintiff, and by which the same became ignited, etc." This averment certainly made the pleading sufficient. See *Louisville, etc., R. W. Co. v. Hanmann*, 87 Ind. 422; *Indiana, etc., R. W. Co. v. Adamson*, *supra*. No error was committed in overruling the demurrer.

The facts averred in the second paragraph of the complaint were, in substance, the same as those alleged in the first paragraph, except that the averments show that the fire was solely caused by sparks which were emitted from the smokestack of the locomotive, and carried directly therefrom to the field of the appellee, and there caused the injury complained of, which, it was averred, occurred through the negligence of the appellant, and without any fault or negligence on the part of the appellee. This paragraph was undoubtedly good, and the demurrer thereto was properly overruled. See authorities last cited above.

As there is no error in the record the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Sept. 25, 1884.

Dowell v. The State.

No. 11,834.

DOWELL v. THE STATE.

NEW TRIAL.—*Surprise.*—*Witness.*—*Diligence.*—A motion for a new trial on account of surprise at the testimony of a witness must be supported by the affidavit of the party showing diligence, and that he was, in fact, surprised by the testimony of the witness.

From the Pulaski Circuit Court.

N. L. Agnew and —*Borders*, for appellant.

W. A. Foster, Prosecuting Attorney, and *B. S. B. Stamats*, for the State.

ELLIOTT, C. J.—The appellant was convicted of a misdemeanor and applied for a new trial on the ground of surprise; his motion was denied, and he assigns for error the ruling refusing his motion.

Where a new trial is asked upon the ground of surprise, created by the testimony of a witness, there must be an affidavit of the party showing, among other things, that there was diligence used by him, and that he was in fact surprised by the testimony of the witness. A stranger can not, as a general rule, make such an affidavit as is required by the party. *Brownlee v. Kenneipp*, 41 Ind. 216. But if it were otherwise, there are no affidavits from third persons upon these points, although there are upon other points.

There is no affidavit from the appellant before us, for the reason that none is incorporated in the bill of exceptions. There is an affidavit attached to his motion, but it is not carried into the bill, and, under repeated decisions of this court, forms no part of the record.

Judgment affirmed.

Filed Oct. 9, 1884.

Cottrell *et ux.* v. *Ætna* Life Insurance Company.

No. 11,056.

COTTRELL ET UX. v. *ÆTNA* LIFE INSURANCE COMPANY.

PRACTICE.—*Exception.*—*Receiver.*—Where no exception is taken to a judgment appointing a receiver, the matter can not be questioned in the Supreme Court.

PLEADING.—*Complaint.*—*Exhibits.*—*Reforming Instrument.*—A complaint to reform a written instrument, which does not contain or exhibit the original or a copy of the instrument, is bad on demurrer.

SAME.—*Demurrer.*—A complaint sufficient for some relief is not bad because not sufficient for all the relief prayed.

SAME.—*Construction.*—*Theory.*—When it appears by the prayer and whole tenor of a pleading, that it was formed on a definite theory, and it is insufficient on that theory, it will be held bad on demurrer, though the facts averred may be sufficient upon a different theory.

SUPREME COURT.—*Transcript.*—*Motion.*—*Bill of Exceptions.*—A motion to discharge a receiver, which is not copied into the bill of exceptions, but appears elsewhere in the record, and a reference thereto is made at the proper place in the bill, is not properly in the record.

From the Superior Court of Vigo County.

W. W. Rumsey, for appellants.

N. G. Buff, *J. T. Pierce* and *A. M. Black*, for appellee.

HAMMOND, J.—This was an action by the appellee against the appellants for the foreclosure of a mortgage and the appointment of a receiver. An answer and a cross complaint were filed by the appellants. The appellee's demurrer was sustained to the cross complaint. A trial by the court resulted in a finding and decree of foreclosure, and the appointment of a receiver.

The appellants assign for error that the court below erred in appointing a receiver, and in sustaining the demurrer to their cross complaint, and that the appellee's complaint does not state facts sufficient to constitute a cause of action.

No exception was taken in the court below to the appointment of the receiver, and no question, therefore, in reference to such appointment is before us. It is well settled that if

97	311
126	475

97	311
129	361

97	311
132	483
132	491
133	427

97	311
140	622

97	311
145	254

97	311
156	633

97	311
169	642

an exception is not taken in the trial court to the ruling, order or judgment complained of, the decision can not be reviewed by this court. 2 Works Pr., sections 1071-2.

The appellants in their cross complaint asked for a reformation of the mortgage sued upon, claiming that, by the fraud of the appellee, it did not correctly express the agreement of the parties. A complaint, cross complaint or counter-claim to reform a written instrument, is insufficient upon demurrer, if such instrument, or a copy of it, is not filed with the pleading. *Plowman v. Shidler*, 36 Ind. 484; *Campbell v. Routt*, 42 Ind. 410; *Branham v. Johnson*, 62 Ind. 259.

The appellants did not file with their cross complaint the original or a copy of the mortgage, and for this reason, if for no other, the demurrer was properly sustained.

No objection is urged against the appellee's complaint, except that it is not sufficient to authorize the appointment of a receiver. But it is sufficient for the foreclosure of the mortgage declared upon. This would have made it good upon demurrer, and, with greater reason, it must be held sufficient as against an attack made for the first time in this court.

After the appellants filed their appeal bond, their motion was made and sustained to discharge the receiver. The appellee has assigned cross error calling in question the correctness of this ruling. The motion to discharge the receiver is copied in the transcript, but not in the bill of exceptions, at the place designated for it. Reference is there made to the place in the record where it is copied. Instead of this reference, it should have been copied at its proper place in the bill of exceptions, and, this not having been done, it forms no part of the record. *Crumley v. Hickman*, 92 Ind. 388, and authorities there cited. Not being properly in the record, the ruling on the motion to discharge the receiver can not be considered by this court.

Affirmed, at appellants' costs.

Filed Sept. 18, 1884.

 Lowell v. Gathright.

ON PETITION FOR A REHEARING.

HAMMOND, J.—Upon petition for a rehearing, appellants call our attention to an averment in their cross complaint to the effect that the mortgage referred to had never been delivered.

It is plain from the whole tenor of the cross complaint, as well as from its prayer for relief, which asks only for the reformation of the mortgage, that it was the intention of the pleader to make a case only for such reformation. The sufficiency of a pleading should be determined from its general scope and averments which develop the theory upon which it is based. Isolated and detached allegations, which are not essential to support its main theory, should be disregarded.

The theory of the pleader having been ascertained, and the pleading being insufficient for the purpose for which it was designed, it can not be held good for some other purpose. This question was fully considered by this court in the opinion delivered by ELLIOTT, C. J., in overruling the petition for a rehearing in *Western Union Tel. Co. v. Reed*, 96 Ind. 195, and the conclusion was there reached, "that a pleading must proceed on a definite theory, must be good on that theory, and must be judged by its general tenor and scope." See, also, the authorities there cited.

The petition for a rehearing is overruled.

Filed Nov. 19, 1884.

 No. 11,550.

LOWELL v. GATHRIGHT.

97	313
156	642

MALICIOUS TRESPASS.—Killing Dog.—Complaint.—In an action for maliciously and unlawfully killing a dog, while the act requiring dogs to wear a collar and metallic tag, R. S. 1881, sections 2647-2651, was in force, it is unnecessary to aver in the complaint that such dog was wearing such collar and tag.

SAME.—Statute Construed.—The provisions of said sections conferred no authority upon any person other than an officer to kill a dog without collar and tag, unless such dog was running at large.

Lowell v. Gathright.

INSTRUCTIONS.—*Exceptions.*—The action of the court in giving instructions presents no question unless an exception was saved.

From the Montgomery Circuit Court.

T. E. Ballard and *M. E. Clodfelter*, for appellant.

M. W. Bruner, for appellee.

BEST, C.—This was an action of malicious trespass for killing a dog. It originated before a justice of the peace, where the appellee, who instituted the suit, recovered judgment. Upon appeal to the circuit court he again recovered judgment, from which this appeal has been taken. Several errors have been assigned. The first is that the complaint does not state facts sufficient to constitute a cause of action. It avers that the appellant, on the 14th day of December, 1882, unlawfully, maliciously and without right, shot and killed a spotted dog, the property of the appellee, of the value of \$200, and to his damage in that sum. It will be observed that this act occurred while the statute requiring a dog to wear a collar with metallic tag was in force, and the objection made to the complaint is that it does not aver that this dog at the time was wearing such collar. This was wholly unnecessary. The averment that the dog was unlawfully killed was sufficient. The appellee was not required to negative the circumstances under which the appellant might lawfully kill the dog. This complaint was good, and the first assignment can not be sustained.

The next assignment is that the court erred in overruling the appellant's motion for judgment upon the special findings of the jury, notwithstanding the general verdict. The jury, in answer to an interrogatory, found that the dog, at the time he was killed, was not wearing a collar with tag attached, and the appellant insists that under these circumstances he was authorized to kill him notwithstanding the fact that he was not running at large. This position can not be maintained. The statute conferred no such authority upon any person other than an officer. The appellant was not an

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officer, and as to other persons it provided that "It shall be deemed unlawful for any dog to run at large without collar and tag as provided in this act; and it shall be deemed lawful for any person to kill the same." This statute simply authorized a person, other than an officer, to kill a dog at large without collar and tag. If he were not at large, such person was not justified in killing him, though he was not wearing a collar and tag. The jury found that the dog when killed was not at large, and as the appellant, under these circumstances, had no right to kill him, the facts found did not control the general verdict, but were entirely consistent with it.

The next assignment is that the court erred in overruling the appellant's motion for a new trial. It embraces several reasons. The first one insisted upon is that the verdict is contrary to the evidence. The only disputed question of fact was whether the dog was running at large. We have examined the evidence and can not disturb the judgment upon this question of fact. The evidence justified, as we think, the conclusion of the jury.

The only other point made is that the instructions given were erroneous. The record fails to show that an exception was saved to them, and, under these circumstances, no question is presented by them. There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed Sept. 20, 1884.

No. 11,889.

SMEIZER v. LOCKHART ET AL.

SURETY OF THE PEACE.—*Record of Justice.*—*Parol Evidence.*—In a proceeding before a justice of the peace to obtain surety of the peace, the record of the justice of the acts and things done by and before him, in such proceedings, is not conclusive, and may be contradicted by parol evidence.

97	315
132	299
97	315
136	100
97	315
0156	89

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SAME.—*Finding of Justice.*—*Judgment.*—*Habeas Corpus.*—In such a proceeding the action of the justice in requiring the defendant to enter into the recognizance required by section 1610, R. S. 1881, or, in default of such recognizance, in committing him to the county jail until discharged by due course of law, is not a “final judgment of a court of competent jurisdiction,” within the meaning of the *second* clause of section 1119, R. S. 1881, which forbids an inquiry into the legality of the judgment or process whereby such defendant is in custody, or his discharge therefrom, under a writ of *habeas corpus*.

SAME.—*Criminal Prosecution.*—*Change of Venue.*—*Bias or Prejudice of Justice.*—A proceeding before a justice to obtain surety of the peace is a criminal prosecution, not for the punishment, but for the prevention of crime; and in such a prosecution, when affidavit is made before the justice by the defendant, that he can not have an impartial trial before such justice on account of his interest, bias or prejudice, at any time before the trial is commenced, and a change of venue is demanded, the justice has no discretion, but it becomes and is his imperative duty to grant such change of venue, and his subsequent proceedings in the case are *coram non judice* and void.

From the Judge of the Gibson Circuit Court, in vacation.

W. M. Land and *J. B. Gamble*, for appellant.

J. E. McCullough and *J. H. Miller*, for appellees.

Howk, J.—On the 26th day of July, 1884, the appellant, Deborah A. Smelzer, presented to the Hon. Oscar M. Welborn, judge of the Gibson Circuit Court, in vacation, her verified petition in writing, wherein she alleged that she, a woman, was unlawfully restrained of her liberty and held in the common jail of Gibson county, by the appellees, Lockhart and Chambers, against right and without any lawful authority whatever therefor; and she then set forth the cause or pretence of her restraint, according to the best of her knowledge and belief, and in what the illegality of her restraint consisted, and she prayed for a writ of *habeas corpus*, which was issued accordingly. To this writ the appellees made separate returns, and upon the hearing had the honorable judge of the Gibson Circuit Court found that the appellant's imprisonment was not illegal, and therefore refused to discharge her from the custody of the appellee Chambers, the sheriff of Gibson county.

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The questions for our decision are fairly presented, we think, as well for the appellees as for the appellant, by the evidence adduced upon the hearing, and by the ruling of the learned judge before whom the hearing was had, in the exclusion of evidence offered by the appellant. It was shown by the appellees, by competent evidence, that on the 21st day of July, 1884, one Lute F. Riley filed with the appellee Lockhart, a justice of the peace of White River township, in Gibson county, his verified complaint in writing, to the effect that he had just cause to fear, and did fear that the appellant, Deborah A. Smelzer, would injure and destroy his property, situated in Gibson county, by burning and otherwise injuring and destroying the same, and that he made such complaint only to secure the protection of the law, and not from any anger or malice. It was further shown by competent evidence that upon such complaint a warrant was issued by the justice, by virtue of which the appellant was arrested and taken before such justice for trial, and the issue in the case was tried by a jury, and a verdict was returned finding that the complaining witness, Lute F. Riley, had "just grounds to entertain the fears expressed in his affidavit, at the time said affidavit was filed;" that thereupon the justice required the appellant to enter into a recognizance, with freehold surety, in the sum of \$250, conditioned for her appearance on the first day of the next term of the Gibson Circuit Court to answer said complaint, and in the meantime to keep the peace toward said Lute F. Riley and all of the inhabitants of this State, and that, failing to give such recognizance, she should be committed to the jail of the county, until discharged by law, and that she pay the costs of this action; and that the appellant having failed to give such recognizance, the justice issued a *mittimus* to the jailer of such county, commanding him to confine the appellant in the jail thereof, until discharged by the law. The appellees also gave in evidence the *mittimus*, so issued by the justice, under which the appellant was committed to the county jail, and was then held in

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custody by the appellee Chambers, as the sheriff of the county, and they then rested.

The appellant then testified, in her own behalf, that her name was Deborah A. Smelzer, and she was the petitioner in this case, "and the defendant in the case of *State of Indiana v. Deborah A. Smelzer*, tried before justice Lockhart at Patoka last week;" and that she was at the trial, and had been in jail ever since. "This paper (referring to a writing handed her by counsel) I signed and gave it to Esquire Lockhart, before the trial." At this point, the bill of exceptions shows that the appellees objected to the witness testifying by parol as to what occurred at the trial, "on the ground that the record of the justice of the peace was conclusive, and that it was not competent to attack it collaterally, or to contradict it by parol evidence," which objection was sustained by the court, and to this ruling the appellant excepted.

Thereupon the appellant offered in evidence a paper writing, from the files of the justice, labelled "Affidavit for change of venue," a copy of which is set out, and offered to prove by the testimony of the appellant and three other witnesses, that before the trial in said cause of the State against the appellant, before said justice Lockhart, had begun, and before the jury had been sworn to try said cause, the appellant, the defendant in said cause, informed justice Lockhart that she demanded a change of venue of said cause from said justice, because of the bias and prejudice of said justice against her, the defendant; that she thereupon handed said affidavit to said justice in his said court, and offered to verify the same upon her oath; that said justice refused to swear her to said affidavit, and refused to grant her a change of venue, on the ground that she had, before that time, demanded a jury in said cause, and, for that reason, was not entitled to a change of venue; that said justice then asked the appellant, if she was ready for trial, when she answered that she was not, but wanted to swear that she could not get justice in his court: but that said justice compelled said trial to proceed, and

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thereupon made the order requiring her to enter into recognizance, in default of which she was committed to jail by said justice.

To the introduction of which written paper in evidence, and the testimony of the witnesses of said facts to accompany it, the appellees objected on the ground that it was not competent to contradict the record of the justice by parol testimony, which objection was sustained by the court, and to this ruling the appellant at the time excepted. No other evidence was introduced or offered by either party on the hearing of this cause.

From the foregoing statement of the proceedings on the hearing of this cause, it is manifest that the first question for our decision may be thus stated: Is the record of a justice of the peace, in a proceeding before him to obtain surety of the peace, conclusive? Or, is it competent to attack such record collaterally, or to contradict it by parol evidence? Our statute declares that "Every person restrained of his liberty, under any pretence whatever, may prosecute a writ of *habeas corpus*, to inquire into the cause of the restraint, and shall be delivered therefrom when illegal." Section 1106, R. S. 1881. If, however, it can be correctly said that the action of a justice of the peace, under the statute, in requiring the defendant, in a proceeding before him to obtain surety of the peace, to enter into the recognizance required by the statute, or, in default of such recognizance, in committing him to the county jail until discharged by due course of law, is a "final judgment of a court of competent jurisdiction," then, under the *second* clause of section 1119, R. S. 1881, the legality of the judgment or process, whereby the party is in custody, can not be inquired into by any court or judge. But if the action of the justice, in such a proceeding, is not a final judgment, we know of no legal reason for holding that the record of his action is conclusive, or that such record may not be attacked collaterally, nor contradicted by parol evidence.

We are of opinion that the action of a justice of the peace,

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in a proceeding to obtain surety of the peace, in requiring the defendant to enter into a recognizance in conformity with the statute, or, in default of such recognizance, in committing him to the county jail, is in no proper or legal sense a "final judgment," if, indeed, it can be called a judgment of any kind. In section 1610, R. S. 1881, it is provided as follows: "If the justice or jury trying the issue shall find that the complaining witness had, at the time the affidavit was filed, just grounds to entertain the fear expressed in his affidavit, the justice shall require of the defendant recognizance and freehold surety * * * * for his appearance before the circuit court on the first day of the next term thereof," etc. In the case provided for in this section of the statute, which is the case at bar, the justice is not authorized to render judgment of any kind, not even for costs; and his order requiring the defendant to enter into a recognizance, etc., can not be regarded as a "final judgment." Counsel on both sides concur in saying that the decision of the learned judge below, upon the point under consideration, was made upon the authority of the following cases in our reports: *Reed v. Whitton*, 78 Ind. 579, *Smith v. Hess*, 91 Ind. 424, and *Farmer v. Lewis*, 92 Ind. 444 (47 Am. R. 153).

It seems to us, however, that the cases cited are not applicable to the case in hand, and can not be regarded as decisive of the question here presented. The record of a justice, in a proceeding to obtain surety of the peace, closely resembles the record of such justice in a case of felony, where he sits merely as an examining court; and it has never been held that his record in this latter case is conclusive. We conclude, therefore, that it was error to hold in this case that the record of the justice was conclusive, and could not be attacked collaterally nor contradicted by parol evidence. It follows from this conclusion that it was error, also, to sustain the appellees' objections to the evidence offered by the appellant.

In *State v. Carey*, 66 Ind. 72, the court said: "It has been

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repeatedly decided by this court, and we can not well see how it could be decided otherwise, that prosecutions to obtain surety of the peace were criminal prosecutions." See the cases there cited. But while they are criminal proceedings, they are prosecutions, *not* for the punishment, but for the prevention of crime. *Murray v. State*, 26 Ind. 141. In such prosecutions the statute expressly provides that "Changes of venue * * shall be granted as in other cases." Section 1609, R. S. 1881. In *Hunnell v. State*, 86 Ind. 431, it is held that an application for a change of venue in a criminal cause, in the absence of any rule of court upon the subject, may be made at any time before the jury are sworn to try the cause. In section 1632, R. S. 1881, it is provided that "Changes of venue shall be granted on the application of the prisoner, as in civil cases," by justices of the peace; and in section 1467, R. S. 1881, it is also provided that "Changes of venue shall be granted at any time before the trial is commenced, whenever affidavit is made before the justice," by the party that he believes "he can not have an impartial trial before such justice, on account of his interest, bias, or prejudice."

The affidavit offered in evidence by the appellant in the case in hand conformed to the requirements of the statute in every particular; and if, as she offered to prove, she handed the justice such affidavit, and offered to verify the same, and thereon demanded a change of venue from such justice, before the trial had begun, and before the jury were sworn to try such cause, there can be no doubt, we think, that it became and was the imperative duty of the justice, under the statute, to grant such change of venue. If the facts were as the appellant offered to prove they were, we are clearly of the opinion that all the proceedings of the justice, in the surety of the peace case, after she tendered her affidavit for verification and demanded a change of venue, were *coram non judice* and absolutely void.

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The order of the honorable judge of the Gibson Circuit Court is reversed, with costs, and the cause is remanded, with instructions to proceed with the hearing on the writ of *habeas corpus* in accordance with this opinion.

Filed Sept. 24, 1884.

No. 11,905.

BOYLE v. THE STATE.

CRIMINAL LAW.—*Murder.—Self-Defence.—Character of Deceased.—Evidence.*

—In a trial for murder the defence was that the homicide was committed in self-defence. The defendant testified as a witness that when he shot the deceased the latter was striking at him with a knife, and that their acquaintance was a brief association as criminals. An offer to testify that the deceased had but the night before told the defendant of two felonious assaults which he had committed, and that he preferred a knife to a pistol as more effective for such work, was refused by the court.

Held, that this was error.

SAME.—*Dying Declarations.*—A dying statement by the victim of a homicide, that the defendant had no reason for making the deadly assault, is admissible in evidence, being the statement of a fact, and not an opinion.

ZOLLARS, J., dissents.

From the Criminal Court of Allen County.

H. Colerick and *W. S. Oppenheim*, for appellant.

F. T. Hord, Attorney General, and *C. M. Dawson*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution for murder, under section 1904, R. S. 1881.

The indictment was in six counts. The first count charged the appellant, William Boyle, with having, on the 15th day of March, 1884, at the county of Allen, in this State, unlawfully, purposely, feloniously, and with premeditated malice, killed and murdered one Daniel Casey, by then and there shooting him to death with a pistol. A jury found the defendant guilty of murder in the first degree as charged above in the first count of the indictment, and fixed his punish-

97	322
130	239
97	322
132	148
97	322
149	404
151	515
97	322
154	636
154	670
97	322
164	272
164	273

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ment at death. After considering and overruling a motion for a new trial, the court pronounced judgment upon the verdict, and sentenced the defendant to be hung on Wednesday, the 1st day of October, 1884.

A freight train running from Crestline, in the State of Ohio, to Fort Wayne, in this State, stopped at Monroeville, in Allen county, early in the morning of the 15th day of March, 1884. One of the brakemen on the train found the defendant and Casey together in a box-car, in which they had been riding without authority from the conductor. The brakeman ordered both of them to leave the car, which they did without unnecessary delay. After coming out of the car, the defendant and Casey fell into a quarrel about something to which no one else gave attention. They proceeded together along one of the streets of Monroeville for a short distance when they came to a stop a few feet apart. At this point the defendant, being seemingly very angry and much excited, declared his intention to kill Casey, and, suddenly drawing a revolving pistol from one of his pockets, fired upon him, inflicting a mortal wound from which death ensued two and a half days thereafter.

The defendant, testifying as a witness in his own behalf, stated that he had first met Casey at Bucyrus, Ohio, on the 12th day of March, three days before reaching Monroeville; that they immediately became acquainted and confidential; that on the afternoon of that day they went to a town fifteen miles north of Bucyrus, the name of which he did not remember, where, during the ensuing night, they burglariously entered some stores, by which means they obtained a large lot of knives, some razors, and a considerable amount of jewelry, all of which they concealed about their persons; that they proceeded thence, partly on foot and partly by railroad, to Lima, Ohio, where, on the night of the 14th of March, they got on to the freight train upon which they were found next morning at Monroeville; that during the night they drank considerable quantities of intoxicating liquor; that

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when the brakeman ordered them out of the box-car, he, the defendant, offered him, the brakeman, one of the stolen knives to conciliate him; that Casey, on that account, became very angry and abusive to him, the defendant, saying, amongst other things, that if he, defendant, ever made so bad a "break" as that again, he, Casey, would kill him; that it was in this way that the quarrel ending in the shooting began; that at the time he, defendant, shot Casey, the latter was, and had been, striking at him with a knife; that, in consequence, the shooting was in self-defence.

Counsel for the defendant thereupon offered to prove by him that while on the freight train between Lima and Monroeville Casey told him, the defendant, that he, Casey, had shot one Fontaine, city marshal of Springfield, Illinois, while the latter was trying to arrest him for a robbery; that he had also stabbed a man at Paris, in the State of Illinois, for which he was sent to the State's prison at Joliet, and that he, Casey, had quit carrying a pistol, as he had ascertained that a knife did its work much more quietly and with better effect. But the prosecuting attorney objecting, the court refused to permit the defendant to make the proposed proof, upon the ground that evidence of particular acts of criminal misconduct, even by his own admissions, was not admissible to establish Casey's bad character as a violent and dangerous man, or in mitigation in any other respect, and that refusal has been made one of the principal questions upon this appeal.

In the case of *Dukes v. State*, 11 Ind. 557, this court said: "As a general rule, it is the character of the living—the defendant on trial for the commission of crime—and not of the person on whom the crime was committed, that is in issue, and as to which, therefore, that evidence is admissible. But, in a case like the present, where the question arises whether the accused acted, in the commission of a homicide, upon grounds that justify him in the deed, it would seem that the character of the deceased might be a circumstance to be taken into consideration. Especially might this be the case, where the accused

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knew that character, and also knew, at the time, the individual by whom the attack upon him or his property, was made."

In the later case of *Fahnestock v. State*, 23 Ind. 231, this court further said: "If the deceased was in the habit of becoming intoxicated, and when in that condition was quarrelsome and violent, and that fact was known to the defendant, and if it is further claimed that the deceased was intoxicated at the time the defendant met him in the saloon, a short time before his death, and that the defendant's conduct on that occasion is claimed to have been influenced by a knowledge of the alleged violent habits of the deceased when so intoxicated, the question of such habits or disposition would seem to be one of *fact* rather than of general character."

Wharton, in his work on Criminal Law, states the rule to be "that, whenever it is shown that a person is himself attacked, it is admissible for him to put in evidence whatever could show such attack to be felonious. He may thus prove that the person assailing him had with him burglar's instruments. He may prove him to be armed with deadly weapons. He may prove him to have been lurking in the neighborhood, on other plans of violence. He is entitled to reason with himself in this way: 'This man comes to my house masked, or with his face blacked; he is the same who has been prowling about in the neighborhood, and is connected with other felonious plans; I have grounds to conclude that such is his object now.' And if so, he is also entitled to say: 'This man now attacking me is a notorious ruffian; he has no peaceable business with me; his character and relations forbid any other conclusion than that his present attack is felonious.' And if such could be a legitimate reason for him to expect and defend himself against a desperate conflict, the facts are such as he is entitled to avail himself of on trial. He must first prove that he was attacked; and this ground being laid, it is legitimate for him to put in evidence whatever would show he had ground to believe such attack to be felonious." Vol. 1, section 641. The case of *Hor-*

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bach v. State, 43 Texas, 242, is a well considered case and gives an able exposition of the law of self-defence. The doctrine it announces is well supported by the authorities cited by it, as well as by the modern current of judicial opinion. It holds in brief that the habit of the deceased of carrying weapons, and his character for violent and passionate conduct, as well as other peculiarities constituting him a dangerous adversary, may, when the proper foundation is laid, be proven as distinct facts, and as part of the *res gestæ*, when such facts which might be reasonably supposed to have had an influence upon the defendant's mind in inducing the belief either that his life was in danger, or that some great bodily harm was likely to result to him. This case impresses us as being not only well supported by authority, but as being also in accord with the principles of justice, and of sound morality. It is cited and commented upon approvingly in a late edition of Greenleaf on Evidence. See vol. 3, 14th ed., sections 27 and 28 and notes.

As, in personal conflicts, every man is permitted, within reasonable limits, to act upon appearances and to determine for himself when he is in real danger, it would seem to follow, as an inevitable consequence, that whoever relies upon appearances, and a reasonable determination upon such appearances, as a defence in a case of homicide, ought to be allowed to prove every fact and circumstance known to him, and connected with the deceased, which was fairly calculated to create an apprehension for his own safety. Any narrower rule than this would, we think, prove inadequate to full justice in all cases of homicide, and would, in many cases, operate as a serious abridgment of the law of self-defence.

When properly construed, the rule recognized by the case of *Horbach v. State*, *supra*, simply permits all the facts and assumptions upon which a defendant acted, under a claim of self-defence, in taking the life of his adversary, to be proved at the trial, and, as thus construed, we know of no rule more in accordance with the principles of justice.

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In the light of the authorities cited, and of our deductions from the general principles enunciated by them, we can only come to one conclusion, and that is, that the court erred in excluding the proposed testimony of the appellant as to the communications made to him by Casey concerning himself, during the night preceding the homicide, and that for that error the judgment will have to be reversed.

One question remains which ought to be ruled upon at the present hearing to relieve the embarrassment which might otherwise result when the cause shall be again tried. The dying declaration of Casey, which had been reduced to writing, was, after satisfactory preliminary proof, read in evidence by the prosecuting attorney, as follows :

“Dying declaration of Daniel Casey, taken at Monroeville, Allen county, Indiana, on the 16th day of March, 1884. Q. What is your name and residence? A. Daniel Casey; Norwich, Connecticut. Q. Have you given up all hope of life? A. I have, of course. Q. Is this declaration which you now make free from all malice? A. Yes, it is; I forgive him. Q. What is the name of the man who shot you? A. I don't know his name. Q. Where were you when he shot you? A. On the corner of Railroad and Empire streets, in the town of Monroeville, Allen county, Indiana. Q. Was the man whom you identified on the 15th of March, in the presence of the marshal of Fort Wayne, J. B. Neezer, Dr. C. A. Lester, and others, the man who shot you? A. Yes, sir; that was the man who shot me. Q. What reason, if any, had the man you have so identified for shooting you? A. Not any that I know of; he said he would shoot my damned heart out. Q. What were you doing at the time the shooting took place?

his

“DANIEL X CASEY.”

mark.

It was objected that this declaration was inadmissible in evidence: *First*. Because it was in the form of a deposition. *Secondly*. Because the answer to the question “What reason,

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if any, had the man for shooting you?" was a mere expression of an opinion by Casey, in disregard of the inhibition imposed by the case of *Binns v. State*, 46 Ind. 311. *Thirdly*. Because it was incomplete by reason of the failure of Casey to answer the last question addressed to him.

In the first place, a dying declaration may be made in answer to questions addressed to the dying man and reduced to writing. 1 Greenl. Ev., section 159 and note; *Com. v. Haney*, 127 Mass. 455; *State v. Martin*, 30 Wis. 216.

In the next place, the words "what reason," referred to in the second objection, were, in the connection in which they were used, synonymous with the phrase "what cause," and plainly had reference to facts within Casey's knowledge, and not to opinions merely which he might have entertained. Casey's answer, "Not any that I know of," was more in the nature of the denial of a fact than the expression of an opinion.

In the case of *Wroe v. State*, 20 Ohio St. 460, the court held that "There is no valid objection to the admission of the evidence of Smith Davison as to the dying declarations of the deceased. The declaration of the deceased, in speaking of the fatal wound, that, 'it was done without any provocation on his part,' is objected to as being mere matter of opinion. Whether there was provocation or not, is a fact, not stated, it is true, in the most elementary form of which it is susceptible, but sufficiently so to be admissible as evidence."

The conclusion reached in that case is sustained in principle by the cases of *Rex v. Scaife*, 1 M. & R. 551, and *Roberts v. State*, 5 Tex. Ap. 141, and the precedent it affords may, as we believe, be safely followed in its fairly analogous application to the question now before us. See, also, Whart. Crim. Ev., sec. 294.

In the third place, the declaration was complete as to the answers to all questions which it purported to answer, and in that sense it was not fragmentary within the meaning of the case of *State v. Patterson*, 45 Vt. 308 (12 Am. R. 200). Besides, the failure of Casey to answer the last question was

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sufficiently explained by his attending physician. In our opinion, therefore, the dying declarations of Casey were properly admitted in evidence.

The judgment is reversed, and the case remanded for a new trial.

Filed Sept. 27, 1884.

DISSENTING OPINION.

ZOLLARS, J.—I concur in the opinion of the court as prepared by Mr. Justice NIBLACK, except so much thereof as holds competent to go to the jury that portion of the dying declarations of Casey in which he stated that appellant had no reason for the shooting that he, Casey, knew of. In cases of this sort the following propositions are settled beyond controversy :

First. The declarations of the deceased are admissible only as to matters to which he would have been competent to testify if sworn in the case. *Montgomery v. State*, 80 Ind. 338 (41 Am. R. 815); *Binns v. State*, 46 Ind. 311; 1 Greenl. Ev., section 159; Roscoe Crim. Ev. 32; Whart. Crim. Ev. 294; 1 Whart. Crim. L. 678; 1 Phillipps Ev., annotated by Cowen & Hill, p. 297; *Warren v. State*, 35 Am. R. 745; *McPherson v. State*, 22 Ga. 478; Taylor Ev., p. 644.

Second. Such declarations must, therefore, be of facts, and not of opinions, belief, conclusions, or inferences from facts. Cases, *supra*.

Third. Such evidence is only admissible under a rule of necessity, constitutes the only case in which evidence is admissible against the accused without the opportunity of a cross-examination, and the right of the accused to meet the witnesses face to face, as provided by the Constitution, R. S. 1881, section 58, and hence must be received with great caution. Roscoe Crim. Ev. 35; *Nelms v. State*, 13 S. & M. 500; *Montgomery v. State*, *supra*; *People v. Sanchez*, 24 Cal. 17; *Leiber v. Com.*, 9 Bush, 11; *State v. Williams*, 67 N. C. 12.

One of the grounds for the exercise of caution, as stated

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by Roscoe is, that the deceased may have stated his inferences from facts concerning which he may have drawn a wrong conclusion.

It should be remembered in dealing with the case before us, that appellant based his defence solely upon the ground that the killing was justifiable, because done in self-defence. He was a witness in the case, and admitted the killing. If I recollect correctly, the shooting by him was proved by other witnesses. There was, therefore, no pressing necessity for the dying declarations, at least, not as to the act of the shooting by appellant. The only really important controverted question in the case was, as to whether the killing was justifiable; whether appellant had any sufficient "reason" for shooting as he did; any "reason" that would render the shooting justifiable. If he had, he was not guilty of murder; if he had not, or had not reasonable grounds to apprehend death or great bodily harm at the hands of Casey, he was guilty of murder. Whether appellant had sufficient "reason" for the shooting, was, and now that a new trial is ordered is, the important question to be settled. He is to be convicted, or acquitted, as it may be found that he had, or had not, sufficient "reason."

That question is all there is of the case. As said by counsel for the State, the dying man might just as well have said there was no "justification" for the shooting. Shall that question be settled by the one comprehensive statement by the dying man, that there was no "reason," or "justification," and that hence appellant is guilty of murder, or shall it be settled by the jury upon all the facts and circumstances attending the shooting?

Following the declaration that there was no reason for the shooting, was the further declaration that "it was cold-blooded." This the trial court struck out, and did not allow it to go to the jury. It seems to me that one declaration was just as competent as the other. If there was no reason, the shooting was cold-blooded, and the crime was murder in the

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first degree. Both statements were conclusions, which should have been left to the jury to draw from the facts in the case.

The majority opinion is based upon the assumption that the dying declaration as to there being no "reason" is the statement of a fact, such as a witness might make from the witness stand, and this assumption is based upon the cases of *Wroe v. State*, 20 Ohio St. 460, *Roberts v. State*, 5 Tex. Ap. 141, and *Rex v. Scaife*, *supra*.

It must be observed, in the first place, that in the Ohio case there was no claim that the killing was in self-defence, and hence the question of "reason," or "provocation," was not so vital as in the case before us.

I can not subscribe to the doctrine of that case, especially when applied to a case like this, where the question of self-defence is really the whole case. I do not think that that case is supported by authority or reason. I find no word of approval of the case in any of the text-books. The reference to it is, generally, in such way as to show that it is regarded as an exceptional case. The whole of the reasoning in that case, upon the question, is as follows: "The declaration of the deceased, in speaking of the fatal wound, that 'it was done without any provocation on his part,' is objected to as being mere matter of opinion. Whether there was provocation or not, is a fact, not stated, it is true, in the most elementary form of which it is susceptible, but sufficiently so to be admissible as evidence. In *Rex v. Scaife*, the declaration of the deceased was: 'I don't think he would have struck me if I had not provoked him.' This was received to prove the fact of provocation on the part of the deceased. 1 Moody & Rob. 551."

In the Texas case, no question was before the court, because the dying declaration was admitted without objection or exception (p. 149). The statement by the wounded man was that the prisoner had killed him for nothing. In speaking of this declaration, and after stating that nothing can be evidence, in a declaration *in articulo mortis*, that would not

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be so if the party were sworn, and that what a person *in articulo mortis* says as to the facts is receivable, but not what he says as a matter of opinion, the observations of the court are closed, with a quotation from Wharton, as follows: “‘ But when, in making a dying declaration, the declarant, in speaking of the fatal wound, said it was done without any provocation on his part, it was held in Ohio that this declaration was not incompetent, it relating to fact, not opinion.’ Wharton *Hom.*, section 765; *Wroe v. State*, 20 Ohio St. 460.” It will thus be observed that there was nothing before the court to decide, and that nothing was really decided.

That the argument in the Ohio case clearly involves a *petitio principii*, must be apparent upon the most casual examination. The very point in controversy is at once assumed, viz., that what the dying man stated, was a fact, and not a conclusion or opinion.

The doctrine of the Ohio case, and the Texas case, so far as it may be said that it is an endorsement of the former, are squarely met in the case of *Collins v. Commonwealth*, 12 Bush (Ky.) 271, decided since the decision in the Ohio case. The dying declarations offered in this case were, “That Michael Collins killed me, and killed me for nothing.” The court after holding that dying declarations are admitted on grounds of necessity, said: “In this case it was unnecessary to prove the declarations of the deceased to establish the fact that the killing was done by the accused. That fact was abundantly proved by several uncontradicted witnesses, and was virtually admitted by the line of defence adopted. The statement that Collins killed the deceased ‘for nothing’ was but the expression of an opinion, and was clearly inadmissible. 1 Taylor *Ev.*, p. 644.”

In the case cited from Moody & Rob. it will be observed that the declarations were in favor of the prisoner. It has been held in Kentucky, that a more liberal rule should be applied in such cases; that when the declarations are offered against the prisoner, they should be confined to facts, and

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not allowed to extend to mere matters of opinion, but when in favor of the prisoner, as that he was not to blame, they may be admitted. *Haney v. Commonwealth*, 5 Crim. L. Mag., p. 47. On the other hand, it has been ruled that such declarations are not admissible, even in favor of the prisoner. *McPherson v. State*, 22 Ga. 478.

I think that the declarations in the Ohio and Texas cases, and in the case before us, were neither of them declarations of facts, but of inferences and opinions, and, being against the accused, were incompetent. Whether appellant had sufficient "reason," "provocation," or "justification," is a fact, but not such a fact as a witness may state; it is the ultimate fact to be found from the facts and circumstances attending the killing; an inferential fact. It can not be settled by the physical senses; it can neither be seen, heard nor felt, but must be the result of mental process; the result of reasoning from other facts. This reasoning may, or may not, create a belief or opinion of the existence of that ultimate fact. All persons will not reason alike, and may not come to the same conclusion from the given facts. Upon the facts and circumstances of the killing, one may conclude that appellant had ample reasons for shooting in the manner and at the time he did. Another, upon the same facts and circumstances, may conclude that he had no reasons at all. The jury may be able to harmonize their several conclusions, and return a verdict as to the ultimate fact. How shall they get at that fact? Shall they perform the mental process, and make the inference, and form their opinions from the facts and circumstances attending the killing, or shall that be done for them by the witnesses—in this case by the dying man? Shall he give to the jury the facts and circumstances, or shall he give to them simply the fact that he has inferred from those facts and circumstances—his opinion upon those facts and circumstances? The rulings have been pretty uniform that dying declarations of the personal identity of the slayer are competent, and, as said in the case of *State v. Williams, supra*, in such identifi-

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cation there is necessarily involved somewhat of opinion, because it is a conclusion drawn from a comparison of the appearance of the person at one time with the recollection of his appearance at some other time, but the admission of such evidence is an exception to the general rule excluding opinions, founded on the necessity of the case. It would be very difficult, if not impossible, to describe these appearances, even of those best known to us. It was said in the North Carolina case, *supra*: "But there must be some limit to the exception; a witness can not be allowed absolutely to substitute his judgment for that of the tribunal to whom the law has committed the decision of the fact. Best Ev., sections 344-5-6. We think the limit may be drawn without any difficulty, and consistently with the habitual practice of courts. Whenever the opinion of the witness upon such a question, or on one coming under the same rule, is the *direct* result of observation through his senses, the evidence is admitted. * * * But if the opinion of the witness is the result of a course of reasoning from collateral facts, it is inadmissible. * * * In such case the tribunal is as competent to reason out the resultant opinion as the witness is; and by the theory of the law, it alone is competent to do so."

In the case before us, there could be no difficulty in stating the facts and circumstances attending the killing, and hence there was no necessity for the expression of an opinion or inference by the dying man. Could the jury have those facts and circumstances, they might disagree with him as to the existence of a "reason" for the shooting. Suppose he had been sworn as a witness in the cause, would it have been competent for him, in answer to appellant's claim of self-defence, to have stated that appellant had no "reason" or "justification" for the shooting? Clearly not. He would have been required to give, not his opinion or inference, but the facts, so that the jury, under the instructions of the court, might draw the inference and form the opinion as to whether ap-

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pellant had such "reason" as rendered the shooting justifiable.

This should be especially so in dying declarations, where there is no opportunity for cross-examination, and to thus get at the facts. *Shaw v. People*, 3 Hun, 272. A cross-examination might develop the facts, and thus show that there is no ground for the opinion. In this case, if the dying man had stated the facts, it might be apparent at once that appellant had ample "reasons," and that the shooting on his part was justifiable.

The cases are not infrequent where dying persons have made positive statements as to the cause and authors of their death, and at the same time stated the facts which showed that their statements as to cause and authors were mere conjecture, inference and opinion. Wharton Hom., section 765; *State v. Williams*, 68 N. C. 60; *Shaw v. People*, *supra*; *People v. Shaw*, 63 N. Y. 36; *Warren v. State*, 35 Am. R. 745.

If in the case before us it would have been competent for the wounded man to state as a witness that appellant had no "reason" for the killing, or, which is the same thing, if it was competent for him to put that statement in his dying declaration, then clearly it would have been competent for appellant to have stated as a witness in his own behalf that he did the shooting, and that it was for sufficient reason, and hence justifiable. To have stated this, would have been to state the whole case. This, clearly, he would not be allowed to do. As a witness, he must state the facts. The jury will decide upon those facts, as to whether or not there was a sufficient reason for the shooting. I regard the question under discussion as of great importance, and the decision by the majority upon it as far-reaching and serious in its consequences. This is my excuse for extending this dissenting opinion to the length I have.

Filed Sept. 27, 1884.

Elverson *et al.* v. Leeds *et al.*

No. 11,572.

ELVERSON ET AL. v. LEEDS ET AL.

PARTNERSHIP.— *Use of Firm Name by Purchaser of Business.—* *Liability of Prior Member to Creditors.*—Where one is engaged in business under a firm name, and under such name purchases goods for such business from the plaintiffs from time to time, and afterwards sells the business and property to a son, who thereafter continues such business under such name, and under such name purchases similar goods from the plaintiffs, who have no knowledge of such sale and transfer, the former is liable to the plaintiffs for the goods thereafter purchased by the son from them under such name.

From the Wayne Circuit Court.

C. E. Shively and *T. J. Study*, for appellants.

H. U. Johnson, *G. S. Needham* and *R. A. Jackson*, for appellees.

BEST, C.—This action was brought by the appellants to recover the price of goods sold and delivered. A separate demurrer to the complaint by each appellee was sustained, and this ruling is assigned as error.

The complaint alleges, in substance, that the plaintiffs are, and for five years have been, partners at New Brighton, in the State of Pennsylvania, engaged in manufacturing and selling rose-pots, and other wares, such as are commonly used in green-houses; that from the year 1878 until the 1st day of June, 1882, the said Hannah A. Leeds owned and carried on in the city of Richmond, in this State, a green-house, and was, during that time, and at that place, engaged in raising and cultivating flowers for sale in connection with said green-house; that said Hannah conducted and carried on said business under the name of "Leeds & Co.," and while she carried on said business under said name, she purchased of the plaintiffs, by such name, at divers times, large quantities of rose-pots and other wares manufactured by them, to be used by her in said business; that said goods were ordered by her in such name, and were thus sold and shipped to her; that at

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the time such purchases were made, the plaintiffs knew that said Hannah either owned said green-house, and was carrying on said business upon her own responsibility, or was interested therein, and was responsible for all goods purchased under the name of "Leeds & Co.;" "that on or about the 1st day of June, 1882, said Hannah A. Leeds sold, assigned and transferred to William B. Leeds, who is her son, her entire interest in said green-house business, property, goods and wares used in connection therewith, without any notice to the plaintiffs or knowledge on their part of such sale, assignment and transfer," and that said "William B. Leeds immediately thereafter continued and carried on upon, and in the same premises, said business in and under the said name of 'Leeds & Co.,' with the knowledge and consent and approval of said Hannah A. Leeds," who "knew that William B. Leeds was ordering and purchasing goods and wares under and in said name of 'Leeds & Co.,' for the purpose of carrying on said business," and who suffered him to carry on said business under the name of "Leeds & Co.," without any objection upon her part; that after said William B. Leeds became the owner of said green-house, and while he was carrying on said business in the name of "Leeds & Co.," and before the plaintiffs had any knowledge whatever that said Hannah A. Leeds had sold and transferred said green-house and business to said William B. Leeds, the latter, in the name of "Leeds & Co.," ordered of the plaintiffs, on the 14th day of November, 1882, 62,300 rose-pots, and on the 5th day of December, 1882, 33,700 more, all of the value of \$475; that the plaintiffs, from their place of business at New Brighton, shipped said goods to "Leeds & Co.," at Richmond, in this State, where the same were received by said William B. Leeds and used by him in said business; that at the time said goods were shipped the plaintiffs believed that said Hannah A. Leeds was still the owner of said property, and was carrying on said business under such name, or was interested therein, and was liable for

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all goods purchased under said name; that said William B. Leeds is insolvent, and that said sum is due and remains wholly unpaid. Wherefore, etc.

The appellees' counsel do not pretend that this complaint was not sufficient against William B. Leeds. He ordered the goods, they were shipped to him, received and used by him, and, of course, he is liable for them. The demurrer by him should, therefore, have been overruled.

The real dispute is whether Hannah A. Leeds is also liable. The appellants insist that, under the circumstances stated, it was her duty to notify them that she had ceased to do business under the name of "Leeds & Co.," and that her failure to do so renders her liable for the goods in question. • This the appellees' counsel dispute. They insist that since she and her son were not partners, and the relation of principal and agent did not in fact exist between them, she was under no obligation to notify the appellants that she had ceased to do business, and as she did not buy the goods she is not liable to pay for them. The facts averred do not show that the son was either the partner or the agent of the mother, and if the rule requiring a partner upon retiring from the firm, or a principal upon the termination of an agency, to give notice of such change, rests alone upon the fact of such previous relation, it can not apply to this case, for no such relation appears to have existed. The rule, however, does not rest exclusively upon such relation, nor has it been thus limited. It has frequently been applied to persons who in fact sustained no such relation. For instance, to persons who have held themselves out as partners, and to persons who have held others out as their agents. In such cases it has been uniformly applied, and the fact of such relation has not been deemed essential to create liability. Indeed, the rule does not rest upon such pre-requisite, but rather upon the fact that since third parties have been led to believe that a certain condition of things existed, and have extended their credit upon the faith of such assurances, the party making

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them shall be bound by them. This rule is generally applied to a retiring partner, not because the former relation existed, nor because the remaining member had in fact any authority to bind him, but because third parties who extend credit upon the faith of such assurance as grows out of the actual or assumed relation, have no notice to the contrary, and to permit him to escape liability would enable him to perpetrate a fraud upon such persons. The consequences that would probably result from the adoption of a different rule is the basis of this one, and we perceive no reason why it should not extend to every case where the conditions and consequences are substantially the same.

A retiring partner sustains no relation to the remaining members that actually authorizes them to bind him; neither did the mother to the son. Such members continue the business in the same name, and so did the son. In these respects the cases are precisely alike. The only difference is that the partner sells a portion, and permits the business to continue, while the mother sells the whole, and permits the business to continue. What possible difference can it make to third parties without notice whether the mother sells a part or the whole, or whether she retires as a partner or sells as owner. In either case the consequences are the same, and we can perceive no reason why she should be liable in one case and not in the other. Third parties are just as likely to lend their credit, and just as liable to be defrauded as though she were a retiring partner; indeed, from a third party's standpoint, she appears as nothing less. She engages in business under a firm name, which imports a partnership, and the business continues under such name, without any notice that she has ceased her connection with it. Why should she not be treated like such partner, and held to the same obligations. The same reasons certainly exist, and as the same consequences may follow, we think the same rules should apply.

In addition to this, we are satisfied that the use of the name by the son, with the mother's "knowledge, consent and ap-

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proval," renders her liable to the appellants. The facts averred show that under this name she did business with the appellants, and that they knew that she was "Leeds & Co.," or was liable for the debts contracted under that name. The act of doing business under that name was an unequivocal representation to the appellants that she was "Leeds & Co.," or was liable for debts thus contracted, and the adoption of such name, and the act of doing business with the appellants under it, were, if no one else was represented by the name, tantamount to an assurance that "Leeds & Co." was, in fact, Hannah A. Leeds. Having given the appellants the assurance that "Leeds & Co." was, in fact, Hannah A. Leeds, the son could not thereafter contract with the appellants under such name while they remained in ignorance of the facts, without such act operating as a continued assurance that Hannah A. Leeds was still doing business under the name of "Leeds & Co." When, therefore, the son did business under such name with the appellants, he was continually representing to them that his mother was still doing business under such name, and as the business was done under such name, with the "knowledge, consent and approval" of his mother, it necessarily follows that she permitted him to thus hold her out as doing business under such name. This would, of course, render her liable to the appellants.

We have not been cited to, nor have we found, any case directly in point. There are many, however, quite analogous. Where a firm dissolves, and the retiring partner permits the continued use of his name, he will be held liable for debts thereafter contracted in favor of those who were ignorant of the facts, though notice of dissolution was given. Collyer Part., section 538; 1 Lindley Part. 440; *Freeman v. Falconer*, 12 Jones & S. 132; *Speer v. Bishop*, 24 Ohio St. 598.

In such case, after dissolution and after notice, the remaining members of the firm sustain no relation to the retiring partner that will enable them to bind him either among themselves or in favor of third parties. Under such circumstances

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the remaining members possess no more power to bind the retiring partner than the son possessed to bind the mother in this case; but if such partner permits the use of his name, he will be bound as though he was in fact a partner. The same principle seems to apply to this case. If the appellants were authorized to regard the name of "Leeds & Co." as the name under which Hannah A. Leeds did business, then the use of such name by the son, with her "knowledge, consent and approval," will bind her as though she was in fact doing business under such name.

It is said, however, that she could not prevent the use of such name. If this were conceded, it is no answer to the averment that he used the name with her "knowledge, consent and approval." If thus done, it was used by her permission. We think the facts stated also render her liable, and that the court erred in sustaining the demurrer filed by her. The judgment should, therefore, be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the costs of the appellees, with instructions to overrule the demurrer filed by each of the appellees.

Filed Sept. 25, 1884.

No. 11,718.**DUKES, RECEIVER, v. LOVE, EXECUTRIX.**

CORPORATION.—*Manufacturing Company.*—*Stockholder.*—*Individual Liability.*—*Employee.*—*Statute Construed.*—A corporation aggregate is not, and can not be, an employee of another corporation, within the meaning of the word "employees," as used in the proviso, in section 3869, R. S. 1881, and a stockholder of a debtor corporation is not individually liable for its debt to another corporation, under such proviso.

From the Marion Circuit Court.

J. B. Julian and J. F. Julian, for appellant.

T. L. Sullivan, A. Q. Jones, F. Rand and J. M. Winter, for appellee.

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HowK, J.—This was a claim filed by the appellant, Aaron N. Dukes, receiver of the Indiana Manufacturing Company, against the estate of John Love, deceased. The appellee, Mary F. Love, executrix of the last will of such decedent, demurred to the appellant's claim or complaint upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, and to this ruling the appellant excepted, and, declining to amend or plead further, judgment was rendered against him for the appellee's costs.

In this court the sustaining of the demurrer to his claim or complaint is the only error assigned by the appellant.

As the receiver of the Indiana Manufacturing Company, the appellant claimed from the estate of John Love, deceased, the sum of \$17,635.85, being the principal and interest of a certain judgment rendered in the Marion Superior Court in favor of such manufacturing company and against the Wooten Desk Company; that such judgment was so rendered upon three promissory notes, executed by the Wooten Desk Company, a manufacturing corporation duly organized, on November 4th, 1874, under the laws of this State, to the Indiana Manufacturing Company, a like corporation also organized under the laws of this State, for a lot of desks manufactured by the latter for the former company, as its employee, in the regular course and prosecution of its business, namely, in the manufacture of desks as the employee of the Wooten Desk Company; that the notes not having been paid at maturity, suit was instituted thereon by the Indiana Manufacturing Company against the Wooten Desk Company, in the Marion Superior Court, on the 4th day of December, 1877, and such proceedings were thereafter had in such suit as that, on the 18th day of December, 1877, judgment was therein rendered on such notes for the sum of \$10,921.40, and the costs of suit, "payable in the gold coin of the United States, and collectible without relief from valuation or appraisement laws, and said judgment to draw interest at the rate of ten per cent. per

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annum ;" that such judgment remained due and wholly unpaid ; that an execution issued on such judgment, on the 7th day of August, 1878, had been returned by the sheriff of Marion county " no property found ;" and that the Wooten Desk Company was at the time of the execution of such notes, and had been since, wholly and notoriously insolvent.

And the appellant averred that the decedent, John Love, having been at, before and after the time the said notes were so executed by the Wooten Desk Company, and at the time the cause of action accrued, a stockholder in such company, having subscribed to its capital stock at and before the execution of said notes, and holding stock therein in his own name in the sum of \$5,000, became and was liable therefor to the appellant receiver as aforesaid for the amount of his said claim and interest thereon ; and that there existed no legal set-off or counter-claim against the appellant's claim in favor of the decedent's estate, or any person or corporation.

The appellant confessedly bases his right to a recovery in this cause upon the language of the *proviso* in section 3869, R. S. 1881, in force since August 24th, 1875. This section is the amended section 2 of an act approved February 25th, 1859, entitled, "An act to secure dues from private corporations, and to extend their immunities to all citizens who may organize on the same terms." Acts 1875, Spec. Sess., p. 29. The section reads as follows :

"The stockholders and members of manufacturing and mining corporations shall only be liable for the amount of the stock subscribed by them respectively ; and privileges or immunities which have been heretofore granted to such corporations shall, upon the same terms, equally belong to all citizens who may desire to incorporate themselves for the same purpose : *Provided*, That such stockholders shall be individually liable for all debts, due and owing laborers, servants, apprentices, and employees for services rendered such corporation."

In considering the question of the sufficiency of the appellant's claim or complaint, in the case in hand, the first point

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presented for decision, in the natural order of things, may be thus stated: Upon the facts stated by the appellant in his claim or complaint, can it be correctly said that the Indiana Manufacturing Company was, in any proper or legal sense, the employee of the Wooten Desk Company, within the meaning of the proviso in section 3869, *supra*? We are of opinion that the question thus stated must be answered in the negative. A corporation aggregate is not an employee of another corporation, within the meaning of the statute; and where one corporation has become indebted to another corporation for work and labor done upon contract, it was never intended by the General Assembly, in the enactment of the above quoted section of the statute, as we construe its provisions, that the stockholders of the debtor corporation should be individually liable for such indebtedness. The statute first declares that the stockholders of a manufacturing corporation, such as the Wooten Desk Company, "shall *only* be liable for the amount of the stock subscribed by them respectively;" and it then provides that for all debts for services rendered such corporation, due and owing a class of persons designated as "laborers, servants, apprentices, and employees," the stockholders shall be individually liable. Here the word *employees* is qualified and its import and meaning limited and controlled by its association with the preceding words "laborers, servants, apprentices," in accordance with the familiar maxim, *noscitur à sociis*. *Aikin v. Wasson*, 24 N. Y. 482.

In *Coffin v. Reynolds*, 37 N. Y. 640, in construing a statute of New York very similar in its terms to the proviso in section 3869, *supra*, the court of appeals of New York say: "As an original question of construction, * * the scope and purpose of the statute was to protect the classes most appropriately described by the words used, as those engaged in manual labor, as distinguished from officers of the corporation or professional men engaged in its service; in short, to furnish additional relief to a class who usually labor for small compensation, to whom the moderate pittance of their wages

 Stone v. The State, *ex rel.* Huffine.

is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers. * * * * If we were to attach to these words any larger meaning, we should be giving the statute a construction which would make it cover every kind of service; while its plain import and intent is to afford protection to a specific class enumerated, with care and discrimination."

We conclude, therefore, that upon the facts stated in the appellant's claim or complaint, in the case at bar, the Indiana Manufacturing Company was not an employee of the Wooten Desk Company, within the meaning of the word "employee," as used in the *proviso* in section 3869, *supra*; and that John Love, as a stockholder in the latter company, was not in his lifetime, and his estate is not since his death, individually liable for the indebtedness of such corporation, described in such claim or complaint, to the Indiana Manufacturing Company or its receiver. Other objections are urged by appellee's counsel to the appellant's claim or complaint; but as the one we have passed upon is fatal to his supposed cause of action, and leads, of necessity, to the affirmance of the judgment below, we need not, and do not, consider these other objections.

The demurrer to the claim or complaint was correctly sustained. The judgment is affirmed with costs.

Filed Sept. 25, 1884. Petition for a rehearing overruled Oct. 15, 1884.

 No. 11,424.

STONE v. THE STATE, EX REL. HUFFINE.

SURETY OF THE PEACE.—Issue.—Pleading and Proof.—Bond.—While the affidavit in proceedings for surety of the peace must state that it is made "only to secure the protection of the law and not from anger or malice," yet the only issue for trial is whether the complainant had just cause for the fears stated, when the affidavit was filed, and if it be found affirmatively in the circuit court, surety must be required though such cause may then have ceased.

97	345
135	414
97	345
138	14

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SAME.—Evidence.—Witness.—In such case the affidavit and record of the defendant's conviction of an attempt to provoke an assault are not admissible for the defendant, such affidavit being in the general language of the statute and made by the complainant, and he having stated, as a witness, that he caused the prosecution.

From the Jasper Circuit Court.

S. P. Thompson, for appellant.

D. Frazer, M. H. Walker, Prosecuting Attorney, and *I. H. Phares*, for appellee.

ELLIOTT, C. J.—This prosecution was instituted by the relator to compel the appellant to enter into a recognizance to keep the peace.

The statute requires that the affidavit, in cases of this kind, shall state that the affidavit was made "only to secure the protection of the law and not from anger or malice," but in providing what the issue shall be, it is declared that: "The issue to be tried in such case shall be, whether the complaining witness has just cause to entertain the fears expressed in his affidavit," and this is the issue in the circuit court as well as in the justice's court. R. S. 1881, sections 1606, 1609, 1612. The effect of these statutory provisions is to dispense with proof of the averment that the affidavit was not made from anger or malice, and to confine the investigation to the question whether the defendant had just cause to entertain the fears expressed in his affidavit.

The court did not err in refusing to permit the appellant to introduce in evidence the record of the judgment of conviction in the prosecution instituted against him for attempting to provoke an assault. A conviction or an acquittal of such a charge could have no effect upon proceedings in a surety of the peace case.

The affidavit of the relator, filed in the prosecution for the offence of attempting to provoke an assault, did not in any respect contradict or explain his testimony upon the trial of the present case. No statements were contained in it which at all cast discredit upon his testimony, or tended to weaken

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its force by way of contradiction. There were, in fact, no specific statements in that affidavit; it merely followed the general language of the statute. The affidavit under immediate mention was not admissible upon the ground that it tended to impair the force of the relator's testimony by contradiction.

There are other ways of weakening the force of a witness' testimony than by impeachment by evidence of contradictory statements, and one way is by showing the malice or ill-will of the witness. *Johnson v. Wiley*, 74 Ind. 233; *Scott v. State*, 64 Ind. 400; *Taylor Ev.*, section 1298; 1 *Greenl. Ev.*, section 450; *Wharton Ev.*, sections 408, 561. Acts of hostility may be shown for the purpose of impairing the credit of the witness, and, perhaps, in cases of this character, it would be proper to show that the witness caused a prosecution to be instituted against the party; but even conceding this to be so, no injury was done the appellant because the relator testified that he caused the prosecution to be instituted. As the appellant proved by the relator's testimony all that the affidavit could have established had it been admitted in evidence, the error, if it was one, in excluding the offered evidence, was harmless.

The jury, in answer to interrogatories, found that when the affidavit was filed the relator had just cause for fear, but that no cause for fear existed at the time of the trial in the circuit court. The appellant moved to modify the judgment so that no bond should be required of him by the court, but this motion was overruled, and the court required a bond from him. We perceive no error in this ruling. The statute provides that "if the finding of the court be against the defendant on the issue as to whether the complaining witness had just cause to entertain the fears expressed in his affidavit when the same was filed before the justice, the court shall require of such defendant recognizance, with freehold surety, that he will keep the peace" for such a length of time as the court may direct. The effect of this provision is to submit a

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single issue for trial, and to make it the duty of the court to require a bond in cases where that issue is decided against the defendant.

We can not disturb the verdict upon the evidence, but must respect the decision of the jury and the judgment of the trial judge, for there is evidence sustaining the verdict.

Judgment affirmed.

Filed Sept. 25, 1884.

 No. 11,508.

FRY v. DAY ET AL.

FRAUD.—Pleading.—Fraud can not be pleaded generally, but the facts must be alleged.

SAME.—Misrepresentation in Execution of Lease.—Fraud in procuring the execution of a lease is not sufficiently shown by an answer merely alleging that the plaintiff deceitfully, and to defraud the defendant, represented that it was in effect merely a receipt, and the defendant, not knowing its legal effect, signed it.

LANDLORD AND TENANT.—Holding Over.—Suit for Possession.—Complaint.—Lease.—Justice of the Peace.—A complaint against a tenant holding over, to recover possession and damages, before a justice of the peace, which avers a lease for a definite time, and that it has expired, and that the defendant refuses to surrender possession, sufficiently shows an unlawful detention of the premises, to be good after verdict.

From the Superior Court of Marion County.

W. C. Lamb and *I. Klingensmith*, for appellant.

W. D. Bynum and *A. T. Beck*, for appellees.

FRANKLIN, C.—This is an action by appellees against appellant as a tenant holding over, for the possession of real estate and for the rents of the premises.

The action was commenced before a justice of the peace, and by the appellant appealed to the superior court, which court, at special term, decided against appellant, when she appealed to the general term thereof, wherein the judgment of the special term was affirmed.

97	348
136	374
136	679
97	348
146	632

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The only error properly assigned in this court is the affirmation by the general term of the judgment of the special term.

The errors assigned in the general term were :

1st. Sustaining demurrer to second paragraph of answer.

2d. Sustaining demurrer to third paragraph of answer.

3d. Overruling motion for a new trial.

4th. The complaint does not state facts sufficient.

The substantial part of the second paragraph of the answer reads as follows: "That she admits the signing of the pretended written instrument mentioned and set out in plaintiffs' complaint, but she says the same was procured from her by the plaintiffs herein by fraud and deceit, and for the purpose of cheating and defrauding her."

Fraud can not be pleaded in this general way, but in order to be a sufficient pleading the facts constituting the fraud must be set forth. *Hess v. Young*, 59 Ind. 379; *Over v. Hetherington*, 66 Ind. 365; *Clodfelter v. Hulett*, 72 Ind. 137; *Hardy v. Brier*, 91 Ind. 91.

This paragraph was fatally defective, and there was no error in sustaining the demurrer to it.

The pleader, in the third paragraph, undertook to state the facts constituting the alleged fraud, in the following language: "That the plaintiff Thomas C. Day, acting for himself and his co-plaintiff, exhibited to the defendant the instrument in writing mentioned in their complaint, and did then and there deceitfully and fraudulently, and for the purpose of defrauding this defendant out of her rights, in her tenancy in said property, represent to her that said instrument so exhibited was nothing but a receipt in effect and legal import, and this defendant not being advised or acquainted with the legal effect or import of said instrument," etc.

This paragraph does not allege that the defendant could not or did not read the instrument, or that it was incorrectly read to her, or that she did not, at the time of signing the lease sued upon, fully know its contents, but it is only al-

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leged that appellee Day at the time misrepresented to her the legal effect of the lease.

It is well settled that misrepresentations of the legal effect of a written instrument do not constitute fraud. *Mullen v. Beech Grove, etc., Park*, 64 Ind. 202; *Burt v. Bowles*, 69 Ind. 1; *Clodfelter v. Hulett, supra*.

This paragraph of answer was also bad, and there was no error in sustaining the demurrer to it.

Under the motion for a new trial, appellant, in her brief, insists that the court erred in refusing to admit certain testimony in relation to false representations about the legal effect of the lease sued upon.

If such representations could not constitute fraud in the pleading, after it was demurred out, they did not tend to constitute a defence to the action. Fraud must be pleaded and proved in order to constitute a defence; it is never presumed. But it is insisted that the testimony was admissible under the general denial. That was not sworn to, and the execution of the instrument was not put in issue, nor was the manner of its execution. But if there had been a good answer of fraud pleaded, under which the testimony could have been admitted, the testimony offered, if admitted, would not have tended to prove fraud in law, and the defendant could not have been harmed by its rejection.

Preceding the offer to introduce the testimony on the misrepresentations of the legal effect of the lease, defendant's counsel offered to prove by defendant that prior to the execution of the lease sued upon defendant had held the same as tenant without day, at a certain rent per month, and that no notice had been served on her to quit. This testimony was wholly immaterial; it made no difference how she held the premises before the execution of the lease sued upon. There was no available error in excluding that evidence.

Subsequently, during the introduction of the evidence, the defendant was permitted to prove the misrepresentations of

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the legal effect of the instrument by her own testimony, which cured any supposable error in its former exclusion; and in her said evidence she testified that Mr. Day read the lease to her, and handed it to her to read; that she could read; read the first half of it and glanced over the balance.

There are other questions stated in the motion for a new trial, and referred to in appellant's brief, in relation to the rejection of testimony, but they are mixed up in a confused way in the brief of appellant, without any indication therein as to where they can be found in the record. The brief is not in compliance with Rule 19 of this court, and we decline further to search after these questions. No other reasons stated in the motion for a new trial, than those in relation to the admission and rejection of testimony, are insisted upon by appellant in her brief, and as to them we find no available error.

In the assignment of errors in the general term of the court below, there was a specification that the complaint did not state facts sufficient to constitute a cause of action. The same specification is re-made in this court. There was no objection made to the complaint in the special term of the court below. The objection now urged against the complaint is that it does not contain any allegation that the defendant unlawfully held over, or that the holding of the defendant was unlawful.

The facts alleged in the complaint show that defendant leased of plaintiffs for one month the property described; that the lease had expired, and that defendant refused to surrender possession to the plaintiffs, and plaintiffs asked for judgment for possession, and damages for the unlawful detention of the premises.

The 5225th section of the R. S. 1881, under which this suit was commenced, reads as follows: "Whenever, in pursuance of legal notice, or otherwise, any landlord or his legal representatives shall be entitled to possession of lands, he may, by himself or his agent, have any tenant who shall unlawfully hold over removed from such lands, on complaint be-

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fore a justice of the peace of the county in which such lands lie, specifying the matters relied on to justify such removal and the damages claimed for detention, describing the premises with reasonable certainty." The 5213th section of the same statute provides that, "Where the landlord agrees with the tenant to rent the premises to him for a specified period of time, * * * no notice to quit shall be necessary."

It will be observed that the allegation in the statute, "unlawfully hold over," is a conclusion of law based upon facts, and when such facts exist, the statute requires the complaining party before a justice of the peace, to "specify the matters relied on to justify such removal and the damages claimed for detention." This statute, in accordance with the general practice, requires the facts and not conclusions of law to be pleaded. The facts pleaded show a holding over under such circumstances as will make the holding over unlawful, and whether it was unlawful or not was purely a question of law, that necessarily accompanies such holding over without being averred. But the complaint does aver an unlawful detention for which damages are claimed. To unlawfully detain is so near synonymous with unlawfully hold over, as to be a sufficient substitution of words to comply with the spirit of the statute, if such allegation should be held necessary.

Before a justice of the peace, technical rules of pleading are not enforced. And this complaint was certainly sufficient to inform the defendant of the nature of the action, and bar another action for the same cause. And according to the rules applied to the practice before justices of the peace, we think the complaint was sufficient, especially when the objection is first raised after verdict and judgment in the case.

In the case of *Alford v. Baker*, 53 Ind. 279, this court, adopting the language of a former decision, says: "After verdict the court will support the declaration by every legal intendment, if there is nothing material on record to prevent it. Where a fact must necessarily have been proved at a trial to justify the verdict, and the declaration omits to

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state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof." See, also, the cases of *Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294, and *Lovely v. Speisshoffer*, 85 Ind. 454.

We think this objection is too late, and not well taken if it had been made in time. We find no error in this record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below, in general term, be and the same is in all things affirmed, with costs.

Filed Sept. 27, 1884.

No. 11,397.

TREES v. SHANNON.

PRACTICE.—*Evidence.*—*Harmless Error.*—The refusal to admit further evidence upon a point concerning which there is no real controversy, and which is clearly established, is a harmless error.

From the Rush Circuit Court.

W. A. Cullen and *B. L. Smith*, for appellant.

W. A. Moore, *M. D. Tackett* and *B. F. Bennett*, for appellee.

HAMMOND, J.—Suit by appellee against appellant for lumber sold and delivered. The complaint was in two paragraphs; the first upon an express, and the second upon an implied contract. Answer, the general denial; trial by jury; verdict for appellee; motion for new trial overruled, and exceptions; and judgment upon the verdict.

It is claimed that the verdict was not sustained by sufficient evidence, and that there was error in excluding certain evidence offered by the appellant.

The bill of exceptions does not purport to contain all the evidence. The question of its sufficiency to sustain the ver-

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dict can not, therefore, be considered. 2 Works Pr., section 1078.

The appellant's theory of the case was that he purchased lumber under a written contract with one McDermott, whom he paid for the same; that the lumber charged for by the appellee in his complaint was, by an arrangement between the appellee and McDermott, delivered to the appellant on said contract with McDermott, and that the appellee should look to McDermott for his pay. Appellant offered in evidence said contract with McDermott, and also a receipt from the latter showing full payment for the lumber purchased of him. These, on appellee's objection, were excluded. The error, if any, in excluding this evidence, was harmless. There was parol evidence, abundant, conclusive, and without conflict, which went to the jury without objection, showing the existence of the contract referred to, and that the appellant paid McDermott for all lumber delivered under it. Upon these points there was no controversy. The real question before the jury was whether the lumber charged for by the appellee was delivered under the McDermott contract, or upon a separate contract, express or implied, between the appellee and the appellant. The contract with, and the payment to, McDermott, being undisputed, further evidence upon these points could have served no good purpose, and its exclusion did no harm. Such excluded evidence could not have thrown any light upon the real question in dispute, namely, whether the appellee's lumber was or was not delivered under the McDermott contract. And as to the real question in issue, it can not be considered, for the reason, already stated, that it does not appear that the record contains all the evidence.

We find no error in the record for which the judgment should be reversed.

Affirmed, with costs.

Filed Sept. 25, 1884.

Milligan v. The State, *ex rel.* Children's Home of Cincinnati, Ohio.

No. 11,224.

MILLIGAN v. THE STATE, EX REL. CHILDREN'S HOME OF
CINCINNATI, OHIO.

97 355
148 385

HABEAS CORPUS.—*Petition.*—*Demurrer.*—*Motion to Quash Writ.*—An application for a writ of *habeas corpus* is not a civil action, and the sufficiency of the complaint or petition can only be questioned by a motion to quash the writ, and not by a demurrer or by the assignment in the Supreme Court, as error, of its want of sufficient facts to constitute a cause of action.

SAME.—*Contract for Custody of Infant.*—*Corporation.*—*Law of Ohio.*—*Construction of Contract.*—The Children's Home of Cincinnati, Ohio, is a corporation organized under the laws of the State of Ohio, and as such it had the lawful charge and custody of an infant, and had power to procure for her a permanent home in a Christian family. By a written agreement, executed at the city of Cincinnati, in the State of Ohio, the Home transferred the care, custody and education of the infant, to the defendant. It is provided in the statutes, under which the Home is incorporated, that its trustees and managers might remove a child from a home, when, in their judgment, the same had become an unsuitable one, and that they should, in such case, resume the same power and authority they originally possessed. In the judgment of the trustees and managers of the Children's Home, the defendant's home had become and was an unsuitable one for the child, and he was not a proper person to have the custody and management of such child, and the Home demanded of the defendant the surrender to it of the custody and control of the child, which was by him refused.

Held, upon the foregoing facts, that the Children's Home had the right to remove the child from the home of the defendant, and to resume its original power and authority over such child.

From the Delaware Circuit Court.

C. E. Shipley and R. S. Gregory, for appellant.

Howk, C. J.—This case is now before this court for the second time. See *Milligan v. State, ex rel.*, 86 Ind. 553. It is a proceeding by the appellee's relator to obtain, by writ of *habeas corpus*, the possession and control of one Laura Belle Hutchins, a minor under the age of twenty-one years. When the cause was here before, the order and judgment of the court, awarding the custody of the child to the relator, were re-

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versed, upon the ground that in its complaint or petition for the writ, the relator had not "pleaded so much of its charter as was requisite to establish in its favor a *prima facie* right to the custody of the child." The court said: "The right which it" (the relator) "asserts is not a natural one, and can exist only by the force of positive statute; and the statute relied on, being a foreign one, must be pleaded according to its tenor, so as to put it in the power of the court to construe or interpret it." *Tyler v. Kent*, 52 Ind. 583.

After the cause was remanded, the relator amended its complaint or petition by setting out the statute of Ohio under which it is incorporated, in conformity with the opinion of this court on the former appeal. Upon the hearing thereafter had, the court found that the facts stated in the complaint or petition were true, and that the relator was entitled to the care, custody and control of the said Laura Belle Hutchins, and the court ordered, adjudged and decreed accordingly.

In this court the appellant has assigned errors as follows:

1. The circuit court erred in overruling his motion to quash the writ of *habeas corpus*;
2. Error of the court in overruling his demurrer to the relator's complaint or petition;
3. Error of the court in sustaining the relator's exceptions to appellant's return to the writ of *habeas corpus*; and,
4. The relator's complaint or petition does not state facts sufficient to constitute a cause of action.

Only the first and third of these alleged errors are properly assigned here, or present any question for our decision. The second and fourth errors proceed upon the erroneous assumption that this is a civil action, and that the sufficiency of a complaint or petition for a writ of *habeas corpus* can be tested below by a demurrer for the want of facts, or by an assignment of its want of sufficient facts in this court. In the recent case of *McGlennan v. Margowski*, 90 Ind. 150, it was held that an application for a writ of *habeas corpus* is not a civil action. The court there said: "The party to

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whom the writ is directed makes his return or answer, not to the petition or complaint, but to the writ itself. The sufficiency of the writ may be tested before making a return or answer thereto, not by a demurrer, but by a motion to quash the writ. The return or answer to the writ is not the subject of demurrer, but its sufficiency may be tested by exception. Section 1117, R. S. 1881; *Cunningham v. Thomas*, 25 Ind. 171."

In *Baker v. Gordon*, 23 Ind. 204, this court held that a *habeas corpus* proceeding is not a "civil case," within the meaning of section 20 of the bill of rights, in the State Constitution of 1851, which provides that "In all civil cases, the right of trial by jury shall remain inviolate." Again, in *Garner v. Gordon*, 41 Ind. 92, it was held that a proceeding by *habeas corpus* is not a civil action, within the meaning of the sections of the civil code, which authorize a change of venue or a change of judge, in civil causes. And again, in *McGlennan v. Margowski*, *supra*, it was also held that under section 1118, R. S. 1881, a proceeding by *habeas corpus* is to be heard and determined, in a summary way, and that neither the court nor judge can be required, as in a civil action, to make a special finding of the facts or state conclusions of law thereon.

In their brief of this cause, the appellant's learned counsel first direct our attention to the alleged error of the circuit court in overruling the motion to quash the writ of *habeas corpus*. Counsel are correct, we think, in stating that this supposed error presents for our decision the question, whether or not the facts stated in the relator's complaint or petition were sufficient, *prima facie*, to justify or authorize the court or judge to issue a writ of *habeas corpus*, as therein prayed for. The objections pointed out by the appellant's counsel, to the complaint or petition of the relator, seem to us to be purely technical, and such as could not be reached even by a special demurrer or a motion to make more specific. Thus, counsel say: "For instance, by the first section of the law of Ohio

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as pleaded (section 2181), it is seen that the law applies only to the case of children's homes and industrial schools, established in cities of the first and second classes; and there is no other statute set out in the complaint showing whether Cincinnati is a city of the first, second, third or any other numbered class." We fail to see the force of this objection to the writ, or to the complaint or petition upon which it was issued.

In its complaint and petition the relator showed that it was a corporation, under the statutes of Ohio, located and doing the business for which it was created at the city of Cincinnati, Ohio; that a part of such business was to receive and take charge of homeless and indigent children, surrendered to the relator by their parents, guardians, etc., and to act as the guardian of such children during their minority, and to procure for them, when deemed proper, permanent homes in Christian families, and to provide for them an English education and Christian and moral training during their minority, etc.; that on the 28th day of May, 1879, Laura Belle Hutchins, then aged about twelve years, was, by her parents, legally surrendered to and placed in charge of the relator, and remained in its charge and possession until the 16th day of September, 1879; that on the day last named the relator, at the request of the appellant, and upon the recommendation that he was a proper person to be entrusted by the relator, and his family and home a proper place for a home for such child during her minority, by an agreement in writing executed by the parties at the city of Cincinnati, in the State of Ohio, transferred the care, custody and education of Laura Belle Hutchins to the appellant, then and since a citizen of Muncie, Indiana, until she should arrive at the age of eighteen years; that the appellant, on his part, agreed to feed, clothe and educate such child, and train her, to the best of his ability, in the precepts of virtue and the Christian religion, so that she might be able to engage creditably in the ordinary business of life; and that, in the statutes under which the relator is incorporated,

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and the agreement and contract between it and the appellant were executed, it was expressly provided as follows: "Sec. 2185. The trustees and managers may remove a child from a home when, in their judgment, the same has become an unsuitable one, and they shall, in such cases, resume the same power and authority as they originally possessed."

The relator further averred that, in the opinion and judgment of its trustees and managers, the appellant's home had become and was an unsuitable home for the child, Laura Belle Hutchins, and the appellant was not a proper person to have the custody and management of such child, and that accordingly, on the first day of November, 1880, the relator had demanded of the appellant the surrender to it of the custody and control of the child Laura Belle Hutchins, which the appellant then and since refused, in violation of the relator's rights under the statutes aforesaid. Wherefore, etc.

We are of opinion that the facts stated in the relator's complaint or petition made a *prima facie* case in its favor, which authorized the issue of the writ of *habeas corpus* as prayed for, and were abundantly sufficient to withstand the appellant's motion to quash such writ. Having contracted with the relator, as a corporation, for the custody and control of the child, Laura Belle Hutchins, the appellant was estopped from denying the corporate existence of the relator, and its legal right and power to dispose of and control the possession of such child. *Cicero, etc., Co. v. Craighead*, 28 Ind. 274; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Mackenzie v. Board, etc.*, 72 Ind. 189.

The only right which the appellant had or claimed to have to the custody and control of the child, Laura Belle Hutchins, he acquired under and by force of his written contract with the relator. He was bound to take notice, therefore, not only of the legal rights and powers, but also of the legal duties of the trustees and managers of the relator in transferring to him the care, custody and control of such child, and in placing her in his family and home. He was affected with full notice

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of the precise tenure of his possession and control of the child, and that the relator's guardianship of such child did not cease upon the execution of the contract by and between it and him, or upon its delivery of the possession of the child to him. He was bound to know that the trustees and managers of the relator might remove the child from his home when, in their judgment, the same had become an unsuitable home for her, and that, in such case, the law required such trustees and managers to resume their original power and authority over such child. This, we think, is the proper and just construction of the statutes of Ohio, under which the contract was executed by and between the relator and the appellant in relation to the child, Laura Belle Hutchins, as between the parties to this suit. The respective rights of the parties to the custody and control of the child, under their written contracts, are fixed and determined, as it seems to us, by the statutes of the State of Ohio. This view of the case leads us to the conclusion that the court did not err in sustaining the relator's exceptions to the appellant's return or answer to the writ of *habeas corpus*.

We find no error in the record of this cause. The judgment is affirmed with costs.

Filed May 6, 1884. Petition for a rehearing overruled Sept. 25, 1884.

[97 360]
[135 242]

No. 11,076.

LYNCH v. REESE.

SHERIFF'S SALE.—*Complaint to Set Aside.*—*Preventing Bids.*—A complaint to set aside a sheriff's sale of land, on the ground that the purchaser prevented others from bidding, is not good unless it also avers that the land was sold for less than its value, or unless it is averred that more land was sold than was necessary to pay the judgment.

SAME.—*Sale by Parcels.*—*Discretion of Sheriff.*—Where the land sold consists of a single parcel, its division rests largely in the discretion of the sheriff, and where it does not appear that such discretion has been abused, the sale will not be disturbed on such ground.

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SAME.—Abuse of Discretion.—The facts which tend to show abuse of discretion must be averred, and it is not enough to merely aver that such land was susceptible of division.

SAME.—When Action may be brought to Set Aside Sale when Bidding was Prevented.—When a purchaser of land at sheriff's sale induces others not to bid, and thus procures the land for less than it is worth, the sale will be set aside, and this will be done though the action is not instituted until after the year of redemption has expired.

SAME.—Fraud.—Statute of Limitations.—Such action is based upon the fraudulent conduct of the purchaser, and may be brought at any time within the statute of limitations.

From the Grant Circuit Court.

G. W. Harvey and *J. Brownlee*, for appellant.

J. L. Custer, for appellee.

BEST, C.—This action was brought by the appellant to set aside a sheriff's sale of land.

The complaint consisted of two paragraphs. A demurrer for the want of facts was sustained to each, and this ruling is assigned as error.

The first paragraph averred, in substance, that the appellant owned thirty-six and one-half acres of land off the west side of the northeast quarter of section eighteen (18), and the northwest quarter of said section (except fifty-eight acres off the north side), in township twenty-three (23) north, of range nine (9) east, in Grant county, in this State; that the appellee purchased said land at sheriff's sale on the 25th day of April, 1880, upon certain executions issued upon two judgments rendered against the appellant, one in favor of the Wayne Agricultural Works, and the other in favor of the appellee, both of which, with the costs thereon, then amounted to the sum of \$191.14; and that the appellee has no other claim to said land; that said sale, and the deed made in pursuance thereof, are invalid, for the reason that the appellee, "at said sale, then and there, for the purpose of preventing other persons who were at said sale, intending to bid at the same, from bidding, then and there represented that said land was encumbered to near the value of the same, which the pur-

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chaser would be liable to pay, which representations so made were false, and did prevent others from so bidding ;” that said sale and deed are also invalid for the reason that “ said real estate was and is of the value of five thousand dollars, and that nine acres of the same would have been sufficient to have paid said executions if the same had been offered at said sale in parcels of that amount, which the said sheriff failed to do ; that at the time the said sheriff levied on said land, “ she” (the appellant) “ turned out to him nine acres of land out of the northwest corner of said tract, then owned by her, which was worth \$400—sufficient to pay said debt, interest and costs, and divisible from said other tract without damage to the whole tract ; that said sheriff informed her that he would first levy upon and sell said nine-acre tract, and not levy on the residue of said land ;” that she supposed and believed that said sheriff had levied upon and sold said nine-acre tract in satisfaction of said writs, and she did not know that any other land had been sold until the year of redemption had expired, and had she known that said land was sold she would have commenced her suit within the year of redemption.

The second paragraph alleged, in substance, that the appellant owned the undivided one-half of said land, and that said sheriff sold it upon the writs described in the first paragraph, for the sum due thereon ; that her interest therein was then, and is now, worth \$5,000, and that the appellee, “ for the purpose of preventing other persons who were present at the sale from bidding for said land, falsely represented that said land was encumbered equal to its full value, which representations were false, and prevented said other persons from so bidding by reason thereof ; the said interest of plaintiff sold for but the sum of \$200, when the same was well worth the said sum of \$5,000 ;” that the appellant’s “ undivided interest in said lands so sold was, and is, of the value of five thousand dollars, ten acres of which would have been sufficient to have paid the amount due on said executions if the same had

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been so offered, which was not done, but the whole undivided interest sold without offering in smaller quantities;" that "there was not at the time of said sale any note, contract or memorandum in writing signed by the said sheriff and defendant, or either of them, nor was the purchase-money, or any part, paid at the time and place where said sale was made;" that appellee afterwards caused partition of said premises to be made with appellant's co-tenant, and that appellant did not learn that said sale had been so wrongfully made until more than three years afterwards, etc.

It will be observed that the first paragraph of the complaint fails to aver that the land was sold for less than its alleged value, and hence the averments as to the appellee's misconduct in preventing bidding at the sale adds nothing to the other averments. *Abbey v. Dewey*, 25 Pa. St. 413.

If the land was sold for its full value, the only thing of which the appellant can complain is that more land was sold than was necessary. The statute provides that "no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division." 2 R. S. 1876, p. 217, section 466.

Where the land levied upon consists of a single parcel, as this does, for aught that is averred, its division rests largely in the discretion of the officer, and where it does not appear that this discretion has been abused, the sale will not be disturbed on this ground. *Wright v. Yetts*, 30 Ind. 185; *Bardeus v. Huber*, 45 Ind. 235.

The facts which show that the parcel is susceptible of division without injury to the whole, and that a portion could have been sold for a sum sufficient to satisfy the writ, must be averred in order to show such abuse of discretion. The naked averment of the pleader, that the parcel was susceptible of division, is not enough to show any abuse of discretion; such an averment is rather the averment of a conclusion than a statement of the facts upon which the sheriff acted in deciding to sell the whole rather than a part.

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It is also averred that the appellant turned out nine acres, which was of sufficient value to satisfy these writs; but it is not averred that the sheriff did not first offer the tract so designated. If so, this was all his duty required him to do, and the fact that it was not sold will not, of itself, vitiate a sale of the entire parcel.

The first paragraph, for these reasons, was insufficient, and the demurrer properly sustained.

The averments in the second paragraph, as to the false representations made by the appellee whereby others were deterred from bidding, were sufficient to vitiate the sale. *Bunts v. Cole*, 7 Blackf. 265 (41 Am. Dec. 226); *Vantrees v. Hyatt*, 5 Ind. 487; *Gilbert v. Carter*, 10 Ind. 16.

The appellee, however, insists that as the action was not brought until after the year for redemption had expired, the appellant must be deemed to have acquiesced in the sale, and relies in support of this position upon the case of *Nelson v. Bronnenburg*, 81 Ind. 193. That case does not decide the question here involved; it simply decides that where land is sold *in solido* instead of in parcels, an application to set aside the sale must be made within the year of redemption. The reason given is that the mode of making the sale is a mere irregularity that the party may waive, and if he does not make his application within such time, he will be deemed to have acquiesced in it. All the cases hold that such application must be made within a reasonable time, and some of them, notably in Wisconsin, within the period of redemption. None of them, however, apply such rule to a case of fraud, and all of them except such cases from its operation. In many cases such sales are deemed absolutely void; while in others they are deemed voidable only. Freeman Ex., section 297, and authorities cited. As the rights of third parties had not intervened, we need not determine whether it is one or the other, as the result must be the same however it may be regarded. No case holds that an action for such cause must be brought within such period, and we know of no rule of law

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that requires it. No other action for fraud is thus limited, but all may be brought, so far as we know, within the period fixed by the statute of limitations. As no reason occurs to us why this case does not fall within the general rule, we conclude that it does, and, therefore, conclude that the fact that this suit, for this cause, was not commenced within the year of redemption, does not bar the action. The judgment should, therefore, be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instruction to overrule the demurrer to the second paragraph of the complaint.

Filed Sept. 25, 1884.

No. 10,613.

HASSELMAN v. UNITED STATES MORTGAGE COMPANY ET AL.

CORPORATION.—*Estoppel.*—*Mortgage.*—One who claims title to real estate, derived solely from a body acting as a corporation, can not question the existence of the corporation in order to defeat a prior mortgage upon the same property executed by the supposed corporation.

97	365
155	64
155	65

From the Superior Court of Marion County.

A. C. Harris and W. H. Calkins, for appellant.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and E. Daniels, for appellees.

NIBLACK, J.—On the 4th day of June, 1874, an association of persons acting as a corporation, and known as the Indianapolis Journal Company, executed a mortgage on certain real estate in the city of Indianapolis, in the possession and use of said company, to Lewis W. Hasselman and William P. Fishback, to secure the payment of a sum of money therein specified. On the 7th day of June, 1875, the said Indianapolis Journal Company, still continuing in business as, and claiming to be, a corporation duly organized, executed

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another mortgage on the same real estate to the United States Mortgage Company, a corporation of the State of New York, to secure the payment of a loan of \$60,000, to fall due August 1st, 1885, with interest payable semi-annually, containing, amongst other things, a stipulation that the entire sum might be treated as having fallen due on the failure to pay, at the proper time, any instalment of interest. As an inducement to the said mortgage company to make said loan, Hasselman and Fishback executed to it an agreement in writing that their mortgage should be taken, construed and considered to be junior to the mortgage executed to it as above to secure such loan.

In 1877 Hasselman and Fishback foreclosed their mortgage, and purchased the mortgaged property at sheriff's sale, subject to the mortgage to the mortgage company, receiving from the sheriff a certificate of their purchase in proper form. This certificate was soon thereafter assigned by them to Otto H. Hasselman, the appellant in this appeal.

The Indianapolis Journal Company having in the meantime been placed in the hands of a receiver, Otto H. Hasselman, the appellant, in 1878, purchased from the receiver the printing and binding establishments, including merchandise and stock on hand belonging to said company, together with its name and good-will, subject to the rights of the mortgage company, and went into the possession of the mortgaged property, claiming to be its owner.

Default having been made in the payment of some instalments of interest, the United States Mortgage Company commenced an action against Otto H. Hasselman, John D. Nicholas, Nicholas R. Ruckle, Harry J. Ketchum, Charles B. Wanamaker, William A. Bell, Henry C. Chandler, Henry Jordan, Joshua K. Speer and Granville M. Ballard, in the superior court of Marion county, to foreclose its mortgage. After averring the facts, herein above stated, in connection with other pertinent matters, the complaint charged that the

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said Otto H. Hasselman went into the possession of the mortgaged property, and claimed the right to, and now holds the possession thereof, as the assignee of the sheriff's certificate assigned to him as above by Hasselman and Fishback, and under his purchase from the receiver of the Journal Company, and under no other right or title whatever, and is now carrying on business in the Journal Building, constituting a part of the mortgaged property, in the name of "The Indianapolis Journal Company."

Otto H. Hasselman answered in eight paragraphs: *First.* In general denial. *Second.* Payment. *Fourth.* Denying the validity of the execution of the mortgage. *Sixth.* Alleging that he was the owner and in the possession of the property described in the complaint, and that his co-defendants were his tenants; that at the time the mortgage sued on was executed, that is to say, on the 7th day of June, 1875, there was no such corporation in existence as "The Indianapolis Journal Company."

The remaining paragraphs respectively set up, in some form, that at the time of the execution of the mortgage, there was not, and never had been, such a corporation as "The Indianapolis Journal Company," because of certain specified defects, or omissions, in the attempted organization of the company known by that name.

Demurrers were sustained to all the special paragraphs of answer, except the second and fourth. Issue being joined upon the last named paragraphs, the court, at special term, made a finding that there was due to the plaintiff for principal, interest and other specific charges against the mortgaged property, the aggregate sum of \$76.987.65, and decreed a foreclosure of the mortgage as against all the defendants.

The suit appealed from in this case was for the review of the proceedings had as above for the foreclosure of the mortgage company's mortgage, in which Otto H. Hasselman was plaintiff, and all the other parties to those proceedings, to-

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gether with John S. Spann and William Henderson, as the representatives of after-acquired interests, were defendants.

The complaint alleged that the court had erred in sustaining demurrers to those paragraphs of answer which denied the existence of the Indianapolis Journal Company as a corporation, and for that reason demanded a review of the proceedings and judgment in question.

The court below, at special term, sustained a demurrer to the complaint and rendered final judgment upon demurrer for the defendants. Upon an appeal to the general term, that judgment was affirmed. We have, consequently, only to inquire whether the complaint for review was sufficient upon demurrer, and that inquiry raises only the question whether the court below erred in its rulings in the original action as charged.

Where the law authorizes a corporation, and there is an effort, in good faith, to organize a corporation under the law, and thereupon, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation de facto, and as a general rule the legal existence of such a corporation can not be inquired into collaterally, although some of the required legal formalities may not have been complied with. Ordinarily, such an inquiry can only be made in a direct proceeding, brought in the name of the State. *Brouwer v. Appleby*, 1 Sandf. 158; *Palmer v. Lawrence*, 3 Sandf. 161; *Morawetz Corp.*, section 142; *Endlich Build. Ass'n*, sections 63, 481, 504, 508, 512, 513; *Baker v. Neff*, 73 Ind. 68; *Williamson v. Kokomo, etc., Ass'n*, 89 Ind. 389; *Field Corp.*, section 349.

No private person having dealings with a *de facto* corporation can be permitted to say that it is not, also, a corporation *de jure*. *Endlich, supra*, section 504, and authorities cited; *Angell & Ames Corp.*, section 636.

One who accepts a conveyance from, or derives title through, a company assuming to be, and acting as, a corporation, and

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relies upon such conveyance, or title so derived, can not be permitted to deny the legal existence of the company as a corporation for the purpose of defeating the claim of some third person. *Dooley v. Wolcott*, 4 Allen, 406.

When an organization has gone into operation as a corporation, and rights have been acquired under it, every presumption should be indulged in favor of the legality of its corporate existence. *Hagerstown Turnpike Road Co. v. Creeger*, 5 Har. & J. 122; *Farmers, etc., Bank v. Jenks*, 7 Metcalf, 592.

In the case of *Palmer v. Lawrence, supra*, and decided more than thirty years ago, Judge DUER, after reviewing a series of cases, summarized as follows: "The general rule, which is fairly deducible from all the cases on this subject, was stated and acted upon by this court, in *Brouwer v. Appleby* (1 Sandf. S. C. 158). It is, that a defendant who has contracted with a corporation *de facto*, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue; but that all such objections, if valid, are only available on behalf of the sovereign power of the State."

The general rule thus formulated has been recognized as embracing a fair synopsis of the law on the subject to which it relates, by a long line of more recent cases.

Conceding the law to be as we have herein above stated and recognized it as being, the inference must necessarily follow that all the paragraphs of answer relying upon alleged defects in the organization of the Indianapolis Journal Company as a defence were bad upon demurrer.

But it is contended that as the sixth paragraph of the answer denied the existence of any such a corporation as that of the Journal Company, *in toto*, that paragraph stands upon a different footing, and ought to be construed as having tendered a material issue in the cause in which it was filed.

It must be borne in mind, however, that the complaint in that cause charged that Otto H. Hasselman went into posses-

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sion of the mortgaged property, claiming to be the owner, under the assignment to him of the sheriff's certificate and under his purchase from the receiver of the Journal Company, and under no other claim of title, and has since so continued in possession, doing business in the name of "The Indianapolis Journal Company." The averment of the sixth paragraph of answer, that the appellant was the owner, and in possession, of the mortgaged property, was not inconsistent with the allegations of the complaint as to the manner in which he went into possession, and as to the claim of title under which he has since continued in possession. That paragraph of answer must, therefore, be construed as admitting the truth of those allegations, that is to say, as admitting that the appellant went into possession under a claim of title remotely derived from the mortgage made by the Journal Company to Hasselman and Fishback, as well as under his purchase from the receiver of the Journal Company, and that the appellant was, at the time, doing business in the name of the Journal Company.

Restrained, as the appellant permitted himself to be, by the force of these admissions, he was estopped from denying the existence of the Journal Company as a corporation, and, under such circumstances, the question as to whether there ever had been in fact any such a corporation became quite immaterial.

For these reasons the sixth paragraph of the answer was also, in our estimation, bad upon demurrer.

The conclusion we have reached upon the pleadings in the original cause constrain us to hold that the demurrer to the complaint for a review of the proceedings had upon those pleadings was correctly sustained.

The judgment at general term is affirmed, with costs.

Filed Sept. 25, 1884.

Pacey v. Powell.

No. 11,569.

PACEY v. POWELL.

97	371
126	38

REPLEVIN.—Possessory Action.—Evidence.—Presumption.—Supreme Court.—

An action of replevin is a possessory action, but where the plaintiff recovers judgment, and the evidence is not in the record, the Supreme Court will presume, in support of the judgment, that he introduced evidence tending to prove his right to the possession of the property in controversy.

From the Delaware Circuit Court.

H. D. Thompson, T. B. Orr, O. J. Lotz and F. Ellis, for appellant.

Howk, J.—In this case, the appellee sued the appellant to recover the possession of a certain gray mare, of which the appellee alleged that he was the owner and entitled to the immediate possession, and that such mare had been wrongfully taken and was unlawfully detained by the appellant, at Delaware county. The cause was put at issue, by the appellant's answer in denial of the complaint, and tried by a jury, and a verdict was returned for the appellee, the plaintiff below. Over the appellant's motion for a new trial, the court rendered judgment in accordance with the verdict.

The only error of which the appellant complains in argument is the overruling of her motion for a new trial. The evidence is not in the record; but a bill of exceptions is set out, containing certain rulings of the trial court, in regard to the evidence, of which rulings the appellant's counsel complain, in their brief of this cause. The only ruling of which complaint is made in argument, and which appellant's counsel say is "the particular matter which we deem objectionable," was founded upon the following interrogatory propounded to the appellee, while testifying on the trial as a witness, in his own behalf, namely:

"You may state if this gray mare, the one mentioned in the complaint, has ever had any colts or offspring, and how

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many, and who has exercised control and ownership over them, if any one?"

It is stated in the bill of exceptions, that the appellant objected at the time to this question, and the answer sought to be elicited thereby, for the reasons then given, "that the same was irrelevant, immaterial, improper, illegal, and because the ownership of the colts and offspring of the mare was not in controversy in this suit, and because the ownership of the mare could not be determined by the ownership of her offspring," but the court overruled the objection, and the appellant excepted. Appellee then answered the question, as follows: "She had several colts; I have owned them; have one of them now, and have sold some of them. The defendant has not claimed any of them, nor had possession of any of them, and never exercised any control over any of them."

In considering the question presented by the ruling complained of, it is to be observed that the competency or admissibility of the evidence objected to is the only question we are required to consider and decide, and not the weight or value of such evidence. If the colts of the mare had been in controversy between the parties, there can be no doubt that the evidence as to the ownership of the mare could have been relevant and competent; for, in such case, in the absence of contract to the contrary, the rule is well established that the title to the offspring of a domestic animal is in the owner of its dam or mother. The converse of this rule, perhaps, is not so clear; but the fact that the mare in controversy had several colts, all of which were possessed, owned or sold by the appellee, was admissible in evidence as tending to prove his title to the mare, leaving the jury to determine the weight and force of the evidence.

But the appellant's counsel claim that the action of replevin is a possessory action, and that evidence, tending to prove the appellee's ownership of the mare, does not tend to prove his right to the possession of the mare. Doubtless, it is true that the action of replevin, under the code, is a pos-

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sessory action. It is true, also, that the mere possessory right to personal property may prevail against the absolute legal title thereto, where such title and the right of possession become separated and are held by different parties. *Rose v. Cash*, 58 Ind. 278; *Kramer v. Matthews*, 68 Ind. 172; *Entsminger v. Jackson*, 73 Ind. 144. Conceding that it was incumbent on the appellee to prove his right to the possession of the mare, it must be presumed, in the absence of the evidence, that he made such proof to the satisfaction of the jury; and the evidence is not in the record.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed Sept. 27, 1884.

No. 11,935.

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97	373
135	520

CRIMINAL LAW.—*Constitutional Law.*—*Pardons.*—*Reprieves.*—*Commutations.*

Remissions of Fines and Forfeitures.—Section 17 of article 5, under the limitations of article 3, of the Constitution of the State, confers upon the Governor the exclusive power to remit fines and forfeitures and to grant reprieves, commutations and pardons.

SAME.—*Cases Disapproved.*—So much of section 1888, R. S. 1881, as authorizes the Supreme Court or a judge thereof, on an appeal from a judgment of conviction, to suspend the sentence of death, and so much of section 1724, R. S. 1881, as invests courts with the power to remit forfeitures, are void as being in conflict with the constitutional provisions above mentioned. *State, ex rel., v. Speck*, 20 Ind. 211, and *State v. Shideler*, 51 Ind. 64, are disapproved so far as they recognize that the power to remit forfeitures does not exist exclusively in the Governor.

From the Whitley Circuit Court.

C. H. Blackburn, H. I. Booth and T. E. Powell, for appellant.

F. T. Hord, Attorney General, *M. A. Sickafoose*, Prosecuting Attorney, and *W. B. Hord*, for the State.

HAMMOND, J.—The judgment of the court below, rendered

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June 14th, 1884, placed the appellant under sentence of death for murder in the first degree, fixing October 10th, 1884, as the time for his execution. He appealed from the judgment, but did not, until October 6th, 1884, file in this court a transcript of the record. He has presented a motion here for a suspension of the execution of the sentence, and the important question now to be decided is whether this court has power to grant his request.

Section 1888, R. S. 1881, provides that "An appeal to the Supreme Court from a judgment of conviction does not stay the execution of the sentence, except where the punishment is to be death, or the judgment is for a fine or a fine and costs only; in which cases the execution of the sentence may be stayed by an order of the Supreme Court or a judge thereof." Section 1874, R. S. 1881, also recognizes the power of this court to suspend the execution of the death penalty in a case pending before it on appeal. Counsel for appellee insist that these statutory provisions are in conflict with the Constitution of the State.

The stay or suspension of the execution of the death penalty provided for and recognized by the sections of the statute referred to is what is usually termed a respite or a reprieve. Sir W. Blackstone, 4 Com. 394, says that "A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended."

"The law of respite or reprieve," says Mr. Bishop, "appears to apply only to capital sentences. The two terms are nearly synonymous. Either signifies the suspension, for a time, of the execution of a sentence which has been pronounced." 1 Bishop Crim. Proc., section 1299. Webster defines the word "reprieve" to be "The temporary suspension of the execution of sentence, especially the sentence of death."

Can the Legislature invest this court with power to grant reprieves? In the absence of constitutional restrictions, the Legislature of a State can, without doubt, confer upon the

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courts within its jurisdiction authority to grant pardons or reprieves. But where the Constitution of a State, by direct terms or by necessary implication, grants such power exclusively to the Governor, it is not competent for the Legislature to confer it upon any other person or tribunal. *Sterling v. Drake*, 29 Ohio St. 457; *State v. Nichols*, 26 Ark. 74.

Article 3 of our State Constitution, section 96, R. S. 1881, distributes the powers of the government into three separate departments, the legislative, the executive, including the administrative, and the judicial, and provides that "no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Section 17 of art. 5 (section 143, R. S. 1881) confers upon the Governor "the power to grant reprieves, commutations, and pardons, after conviction, for all offences except treason and cases of impeachment, subject to such regulations as may be provided by law." It also invests him with "power to remit fines and forfeitures, under such regulations as may be prescribed by law." There is no express provision of the Constitution providing for the exercise of these powers by any person charged with official duties under the legislative or judicial department. The conclusion seems to be inevitable that in this State the Governor, under such regulations as may be provided by law, has the exclusive power to grant pardons, reprieves and commutations, and to remit fines and forfeitures. It follows that any legislative enactment which attempts to clothe the courts, or any of the courts, of this State with these powers, or any of them, is void as being in conflict with the fundamental law. The reasons for this conclusion are more fully presented in quotations which we make from some of the decided cases.

The State v. Sloss, 25 Mo. 291, was a case arising upon an act of the Legislature attempting to relieve persons from penalties incurred by violations of a certain penal statute. It was held that it was not competent for the Legislature to do this,

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as it was an invasion of the pardoning power which, by the Constitution of the State, was vested exclusively in the Governor. It was said in that case: "The powers of the General Assembly are not unlimited. All the departments of our government are confined in their operations. They have prescribed limits, which they can not transcend. The union of the legislative, executive and judicial functions of government in the same body, as shown by experience, had been productive of such injustice, cruelty and oppression that the framers of our Constitution, as a safeguard against those evils, ordained that the powers of government should be divided into three distinct departments, and that no person charged with the exercise of powers properly belonging to one of these departments should exercise any powers properly belonging to either of the others, except in the instances expressly directed or permitted by the Constitution. Although questions have sometimes arisen whether a power properly belonged to one department of government or another, yet there is no contrariety of opinion as to the department of the government to which the power of pardoning offences properly appertains. All unite in pronouncing it an executive function. So the framers of our Constitution thought, and accordingly vested the power of pardoning in the chief executive officer of the State."

It may be observed that under the Constitution of this State the power of granting reprieves is as clearly and exclusively vested in the Governor as that of granting pardons.

In *The Attorney General v. Brown*, 1 Wis. 513, the court said: "The policy of our Constitution and laws has assigned to the different departments of the State government, distinct and different duties, in the performance of which, it is intended that they shall be entirely independent of each other; so that whatever power or duty is expressly given to, or imposed upon the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case, where the subject is committed to the discre-

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tion of the chief executive officer, either by the Constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise."

The Legislature of Alabama passed a special act requiring a county treasurer to refund to certain sureties money which they had been compelled, by judgment of court, to pay as a fine for their principal. In *Haley v. Clark*, 26 Ala. 439, it was held that the act was an attempt indirectly to remit a fine, and was in conflict with the Constitution. The following language occurs in the opinion: "The principal question is, whether this act is unconstitutional. By article IV, section II, of the Constitution of Alabama, the power to remit fines and forfeitures is given to the Governor, and by the second article, the powers of the government are divided into three distinct departments—the legislative, executive and judicial, and no one of these departments, or person belonging thereto, can exercise any power properly belonging to either of the others, unless expressly directed or permitted by the Constitution. The power to pardon offences, except in case of treason and impeachment, and to remit fines and forfeitures, being, as we have seen, confided by the fundamental law to the executive branch of the government alone, this power is virtually denied to any other department, and can not, therefore, be exercised by the Legislature."

Article 3 of the Constitution of Indiana, while too plain to admit of construction, has in several cases been considered by this court, and the law is well settled that constitutional restraints are overstepped where one department of government attempts to exercise powers exclusively delegated to another. *Wright v. Defrees*, 8 Ind. 298; *Waldo v. Wallace*, 12 Ind. 569; *Trustees, etc., v. Ellis*, 38 Ind. 3; *Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427.

Section 50, 2 R. S. 1876, p. 382, and section 1724, R. S. 1881, recognize the power of courts to remit forfeitures of recognizances. We are satisfied such power does not exist in, and

that it can not be conferred upon courts by the Legislature. Courts may, from inherent powers or those conferred by statute, set aside judgments forfeiting, or upon forfeited recognizances, the same as other judgments, for fraud, mistake, inadvertence, surprise or excusable neglect, or in proceedings for review. But courts have not, nor can the Legislature confer upon them, authority to grant pardons, reprieves or commutations, nor to remit fines and forfeitures. These powers, under the Constitution, belong exclusively to the chief executive officer of the State, and they can not be exercised, directly or indirectly, either by the legislative or judicial department.

There was language used in *State, ex rel., v. Speck*, 20 Ind. 211, and *State v. Shideler*, 51 Ind. 64, which was not necessary, in our opinion, to the decision of those cases, to the effect that the power to remit forfeitures does not exist exclusively in the chief executive officer of the State, and which is now disapproved.

Our conclusion is that this court has no power to grant reprieves, and that the appellant's application for delay of execution of his sentence must be denied.

Filed Oct. 9, 1884.

No. 11,935.

BUTLER v. THE STATE.

CRIMINAL LAW.—Constitutional Law.—Right to Impose Terms Where Accused Asks to Take Depositions in a Foreign Jurisdiction.—The Legislature has power to impose terms upon a person accused of crime, who asks and receives the privilege of taking depositions of witnesses in a foreign jurisdiction, and a statute which provides that the accused may take testimony by depositions in a foreign jurisdiction is not unconstitutional because it requires that the defendant shall enter of record his consent that the prosecution may also take the depositions of witnesses residing out of the State.

SAME.—Federal Constitution.—In What Cases its Provisions Apply to State Prosecutions.—The general rule is that the provisions of the National Con-

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stitution do not apply to the procedure by the State in prosecutions for offences against its laws, but when the constitutional provision names the States it is otherwise. As the States are not named in the section which provides that a person accused of crime shall "be confronted with the witnesses against him," its provisions do not control the question of the power of the State Legislature to enact a statute granting an accused a right to take depositions upon condition that he consent to the exercise of a similar right by the prosecution.

SAME.—*Waiver of Constitutional Privilege.—Witnesses.*—A defendant in a criminal prosecution may waive the benefit of the constitutional privilege of being confronted by the witnesses.

SAME.—*What Constitutes.—Depositions.*—Where the defendant accepts a right to take depositions in a foreign jurisdiction under a statute requiring him to concede a like privilege to the State, he waives the constitutional privilege of being confronted by the witnesses against him.

SAME.—*Withdrawal of Consent.*—After the defendant has acted upon the order of the court, and taken depositions under it, he can not withdraw his consent.

SAME.—*Practice.—Right to Limit Number of Witnesses.*—Within reasonable limits, the trial court has a right to limit the number of witnesses that may be called, and if there is no abuse of discretion the appellate court will not interfere.

SAME.—*When Evidence Must be in Record.*—When it is necessary that all the evidence should be in the record in order to show that a ruling complained of injured the appellant, there can be no reversal in the absence of the evidence from the record.

SAME.—*Jurors, Statements of.*—The statements of a juror in answer to questions touching his competency are to be taken together, and his competency is not to be determined from mere isolated and detached statements.

SAME.—*Competency of Jurors.*—A juror is not necessarily incompetent because in answer to a question he discloses the fact that he has an erroneous view of the law governing the defence of insanity, but also discloses in his answers a willingness and an ability to yield readily to the law as it exists.

SAME.—*Juror's Opinion of Feigned Defence of Insanity.*—A juror is not necessarily disqualified because he expresses an opinion that the defence of insanity should be carefully scrutinized, and also expresses himself as strongly opposed to feigned defences of that character, but states further that he is not prejudiced against genuine defences of that character.

SAME.—*Juror's Opinion Founded on Rumors and Newspaper Reports.*—As a general rule opinions founded on newspaper reports and rumors do not disqualify.

From the Whitley Circuit Court.

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C. H. Blackburn, H. I. Booth and T. E. Powell, for appellant.

F. T. Hord, Attorney General, *M. A. Sickafouse*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, C. J.—The appellant was convicted of the crime of murder in the first degree and sentenced to death. The judgment on the verdict was pronounced on the 14th day of June, 1884, the transcript was certified by the clerk to the appellant on the 27th day of September, and filed in this court on the 6th day of the present month. We have dispensed with all formalities in the matter of preparing the record, and have given the appellant full hearing upon all the questions presented by the record and argued by counsel.

The evidence is not in the record, and we can not, therefore, consider any questions which require for their just comprehension and decision an examination of the evidence. This rule has always prevailed in this State and has been many times enforced.

Our statute enacts that we shall not reverse a judgment in a criminal case except for errors prejudicing the substantial rights of the appellant. R. S. 1881, section 1891. It is a familiar rule that all reasonable presumptions are indulged in favor of the rulings of the trial court, and that on appeal the appellant must affirmatively show that errors were committed prejudicial to his rights, and where the evidence is necessary to make it appear that the substantial rights of the defendant were prejudiced, it must be in the record.

The record shows that the appellant applied to the court for leave to take depositions in the State of Ohio; that the court ordered that leave be granted to take the depositions of forty-five witnesses at Columbus, Crestline and Cincinnati, upon condition that the appellant enter his consent that the prosecution might also take depositions out of the State relative to the same matter. This consent was entered of record. It is contended that the court had no right to exact

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the consent of the appellant, and that section 1805 of the statute, which reads thus: "The defendant may, by leave of court, take the depositions of witnesses residing out of the State, to be read on the trial; but, before leave is given, the defendant must enter of record his consent that the depositions of witnesses residing out of the State may be taken and read on behalf of the State, relative to the same matter; and the defendant may, on the same terms, and by leave of court, or by notice to the prosecuting attorney, take the deposition of any witness conditionally," is unconstitutional and void.

The argument is that the statutory provision is in conflict with that section of the Constitution of the State, which declares that one accused of crime shall "have the right * * to meet the witnesses face to face; and to have compulsory process for obtaining witnesses in his favor." Const., art. 1, section 13.

The statute under examination confers upon an accused person a right he did not have at common law, namely, the right to take depositions in a foreign jurisdiction, and confers it upon condition that he shall concede a like privilege to the State. No right is taken from him, but an additional one is granted him. It seems clear to our minds that a statute conferring a new and beneficial privilege upon a defendant can not be deemed unconstitutional because it annexes to the grant a condition favorable to the State, but just in itself and not oppressive to the accused. The right stands as it is given by the statute, and that is a right to exercise the privilege conferred upon the condition that a like privilege be conceded to the State. No restraint is imposed upon the accused; it is left to his free, unfettered choice; he may accept the offered privilege, or he may not, just as he wills. But if he does accept it, he must take it as the statute gives it. The right conferred by the statute is a single, indivisible one; the condition is an integral part of it, and if the accused accepts the benefit of the statute, he must take it just as it is given; he can not take it in part and reject it in part. In his accept-

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ance of the new right, he takes solely by virtue of the statute, and necessarily takes the burden with the benefit. He can not create a right, he can only take what the law has created. We are of opinion that the statute does not contravene the provisions of the State Constitution.

- We think it settled by the adjudged cases that the general rule is that provisions of the Federal Constitution do not govern trials of criminal offences committed against the laws of a State. *Twitchell v. Com.*, 7 Wall. 321; *Barron v. Baltimore*, 7 Peters, 243; *Baker v. Gordon*, 23 Ind. 204; *Cooley Const. Lim.* (5th ed.) 26. The provisions of the Federal Constitution, touching the rights here involved, do not name the States, as is done in the provisions discussed in *Kring v. Missouri*, 107 U. S. 221, and *Tennessee v. Davis*, 100 U. S. 257; and where the States are not named, the provisions of that instrument do not control their legislation. But, conceding that the section of the National Constitution does control procedure in the State courts, it is substantially the same as that of the Constitution of the State, and what we have said in discussing the provisions of our Constitution disposes of the argument that our statute is in conflict with the Federal Constitution. There is, we may add, more reason for refusing to hold that the Constitution does not apply to such a case as this, than there is for holding that the statements of deceased witnesses, and dying declarations, are competent evidence, notwithstanding the constitutional provision, and yet on those questions the law is firmly settled. *Cooley Const. Lim.* 389, auth. n. It has been held by the highest court of the land, that this constitutional provision can not be successfully invoked by one who has fraudulently procured the absence of the witness, and surely the case of one who, to secure a statutory right, solemnly enters his consent of record that the State may also take depositions, stands upon the same general principle. *Reynolds v. U. S.*, 98 U. S. 145. To permit him to repudiate his solemn act, done in open court,

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and made part of the record, would be to permit him to take advantage of his own wrong.

If, however, the accused did have a constitutional right to confront the witnesses, still there is no cause for reversal, because that right was waived. Our decisions have steadily maintained the power of a defendant to waive a constitutional provision intended for his benefit. A striking application of the doctrine was made in the case of *Veatch v. State*, 60 Ind. 291. In that case the appellant had been tried on an indictment charging murder, and was convicted of manslaughter, but afterwards obtained a new trial. In the course of the opinion it was said: "The theory of the appellant is, that the former verdict, which was for manslaughter only, operated as an acquittal of murder in either of its degrees; and that, upon a subsequent trial, he could not be convicted of murder in either degree. The Constitution, it is true, provides, that 'No person shall be put in jeopardy twice for the same offence.' But there are many cases in which this constitutional provision is deemed to have been waived. Thus, if one is convicted of an offence, and obtains a new trial, either in the court in which the case is tried, or on appeal or writ of error, he is deemed to have waived the constitutional provision, and may, of course, be put upon trial the second time for the same offence, and so on as often as he obtains a new trial. The statute regulating criminal pleading and practice provides, that 'The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict can not be used or referred to, either in the evidence or argument.' * * Now, it would seem, that, if a party takes a new trial in a criminal case, he takes it on the terms prescribed by the statute, and consents to be placed 'in the same position as if no trial had been had.' " The principle laid down is that which rules this case, and it is in accordance with many decisions of our court. *McCorkle v. State*, 14 Ind. 39; *Morgan v. State*, 13 Ind. 215; *Sanders v. State*, 85 Ind. 318 (44 Am. R. 29), see op. 332; *Turner v. Wilson*, 49 Ind.

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581, *vide* opinion, p. 585 ; *Behler v. State*, 22 Ind. 345 ; *Boggs v. State*, 8 Ind. 463.

The text-writers approve the rule and declare it to be applicable to such cases as the present. Mr. Bishop, in speaking of the constitutional provision, says: "A party, who can waive most rights, may under various circumstances waive this one, and by consent submit to evidence by depositions, and to other testimony not delivered orally at the trial." 1 Crim. Proced., sec. 1205. The same doctrine is laid down in *Weeks on Depositions*, 565, 566. Many well considered cases give full support to this doctrine. *State v. Worden*, 46 Conn. 349 ; S. C., 1 Crim. L. Mag. 178 ; *Sahlinger v. People*, 102 Ill. 241 ; *State v. O'Connor*, 65 Mo. 374 ; S. C., 27 Am. R. 291 ; *State v. Polson*, 29 Iowa, 133. A strong and well reasoned case, fully in point, is that of *United States v. Sacramento*, 2 Mont. 239 ; S. C., 25 Am. R. 742. We think that the case of *People v. Murray*, 5 Crim. L. Mag. 223, supports this view. If the right to object to the depositions offered in evidence in that case was one which the defendant could not waive, then he undoubtedly might make his objection at any time before the case was finally disposed of on appeal. To say that it is an objection which could not be waived, and yet *was* waived, is to assert two contradictory propositions. It involves a palpable contradiction to affirm that a right can not be waived, and yet was waived. The fair interpretation of the language of that decision is that the right to be confronted with witnesses is one which may be waived and which consent did waive.

That the construction of the Constitution and the rule contended for by appellant can not be correct, an illustration will prove. The section of the Constitution relied on by counsel provides that the accused shall have a right "to a public trial * * in the county in which the offence shall have been committed," and our statute gives a change of venue. Would it be seriously pretended that if the accused avails himself of the provisions of this statute, and secures a change of

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venue, he can, after trial, insist that the statute is unconstitutional?

The case in hand is stronger than any of those cited, for here the appellant asked and received the benefit of a new right expressly created by statute. He really obtained, as we have seen, a purely statutory right, and an essential part of that right is the consent that the State may also take and use depositions. It was this statutory right for which he asked and he could only receive the right as the statute created it, and having received what he sought, and all he sought, he can not demand the overthrow of the statute which created the right.

For more than thirty years the statutory provision under discussion has been acted on by the Legislature, the courts and the people of this State, and we see no just reason for now overturning it.

It is true that we have held that a jury of less than twelve can not lawfully be empanelled, and that the consent of the defendant will not waive his right to object that a jury of less than twelve is not a lawful one. But the principle which supports these decisions is different from that which rules here. A jury is a part of the court, and courts can only be constituted as the Constitution requires. The jury is important to the public as well as to the defendant, for the object of the Constitution is to bring into court men from the body of the people to assist in the administration of the law. Questions respecting the composition of a jury are, in their nature, jurisdictional, just as are questions respecting the composition and existence of courts. Here the right is in the nature of a privilege which only concerns the individual defendant, and bears only upon the procedure on the trial. *State v. Worden*, 46 Conn. 349; S. C., 1 Crim. L. Mag. 178. Questions as to the composition of the jury affect the tribunal itself; while questions such as this affect only the individual, and the method of procedure. In the cases upon the subject of waiving a full

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jury, there was no question of legislative power involved, for there is no statute authorizing it, and here there is a statute authorizing a waiver. The question here is whether the Legislature has power to authorize the accused to waive a constitutional privilege. No one doubts that our statute, providing that in felonies not capital a jury trial may be waived, is valid, and yet in the same section of the Constitution relied on by the appellant it is written, "the accused shall have the right to a public trial by an impartial jury." The statute to which we refer has stood unchallenged for nearly half a century, and many convictions have been sustained under it, and this long acquiescence by all the branches of the government, and by the people, affords some assistance in construing the constitutional provision. It is not difficult to perceive the radical difference between the two classes of cases, and there is no reason for departing from a long settled practice.

The court has a discretion as to the number of witnesses that may be called. This rule is recognized in the case of *Gardner v. State*, 4 Ind. 632. If the court had no discretion in such cases, then the case might be indefinitely delayed, and an unlimited number of witnesses called. But for this rule courts would be subject to the caprice of counsel, and public good would seriously suffer. We agree that this discretion should be so exercised as not to impair the rights of a defendant, nevertheless it does exist. But as the power is a discretionary one, an appellate court can only interfere where it has been abused. If we can say from the record that the discretion has been abused, then we should review the ruling and reverse the judgment. This we can not say, for the number of witnesses was limited to forty-five, and this, in itself, was not an unreasonable limitation. There are no facts in the record showing it to be unreasonable, for, as we have seen, the evidence is not here. Under the rules stated in the introductory part of this opinion, we must presume in favor of the just exercise of this discretion, and must also presume

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that nothing was done that worked prejudice to any of the substantial rights of the appellant.

After the appellant had asked, accepted, and acted upon the order of the court, he could not withdraw his consent. As said by COOLEY, J., in *People v. Murray, supra*, he could not play fast and loose with the court. If he had declined to take depositions under the order granted him at his request, a different case would have been presented, but this he did not do; on the contrary, he availed himself of the right awarded him under the statute, and, having received the full benefit of it, yet asks that the statute be struck down. He makes this demand without having withdrawn, or offered to withdraw, the depositions taken by him. He demands the benefit but seeks to escape the burden. It would be unjust to permit him to succeed; he asks that which is neither equitable nor just, and we deny his demand.

We can not know, in the absence of the evidence, that the rulings of which he complains did him injury; for anything that appears, the depositions taken, as they must have been, as entreties, may have done him no harm. We can not, in view of the rules heretofore adverted to, presume that they did do him an injury. But we do not press this consideration, for the rulings of the trial court commend themselves to our minds as eminently proper.

The remaining question arises on the ruling of the court upon the challenges of jurors for cause interposed by the appellant. It is a principle of law running through all of its various branches, that all of the declarations of a witness, or a party, must be taken together. The statements of a speaker and the writings of an author are to be judged, not from detached sentences, but from all that is said or written upon the same subject. This is, indeed, a principle of interpretation prevailing in logic, rhetoric, ethics and philosophy. It would be illogical and unjust to act upon disjointed parts of a statement. Under this rule the statements of jurors fall. All that a juror says upon a subject is to be taken, and from all

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his statements his competency must be determined. Taking into consideration all the statements of the juror whose examination makes the strongest case for the appellant, we think that it does not appear that the trial court erred in allowing him to sit in the case. It appears that with the appellant he had no personal acquaintance, and that he had never seen him until he saw him at the bar of the court; that all he, the juror, knew of the case he had learned from newspapers and rumors. It is true that the examination of the juror showed that he had a mistaken view of the law applicable to the defence of insanity, but it is also true that he disclosed a willingness and an ability to yield readily to the law as it exists. More than this, it appears that his opinions were adverse, not to genuine defences of insanity, but to feigned defences of that character. That a man is inclined to view the defence of insanity with scrutinizing caution is no objection to his competency, for it is well settled that it is proper for the court to instruct the jury to scrutinize the defence with care. Speaking of an instruction of this tenor, it was said in *Sawyer v. State*, 35 Ind. 80: "The observations of the court in that respect meet our unqualified approval." *Goodwin v. State*, 96 Ind. 550; *Guiteau's Case*, 3 Crim. L. Mag. 347, Wharton's notes. That the juror expressed himself as impressed unfavorably, and strongly so, by what he had heard and read of the crime is true, but it is also true that he affirmed that this impression would yield to the evidence and the law. We suppose most men are moved by a narrative of a crime, but this of itself does not necessarily render them incapable of justly weighing the evidence and properly applying the law. *Elliott v. State*, 73 Ind. 10. In the case cited it was said: "A juror's opinion of the morality of a particular transaction certainly can not be considered in determining his competency to try one accused thereof. If so, jurors could not be found to try those charged with murder, arson, rape, or any of the crimes which are *mala in se*. All good men, and most bad men, are prejudiced against such acts, and

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deem them improper and immoral." The subject we are discussing received careful consideration and was elaborately discussed in *Stout v. State*, 90 Ind. 1, and it was said, as we may say here: "At all events the facts presented by the answers of each one of these persons raised a question for the decision of the court in connection with the general appearance and the demeanor of the proposed jurors, and concerning which the provision, quoted as above, confers a judicial discretion, and there is nothing disclosed from which we can infer any abuse in this case of the discretion thus conferred."

We have given the appellant the benefit of the most favorable construction of the record possible, and have given to the able arguments of his learned and zealous counsel all the care and consideration that we could command, but we can find no error that will warrant a reversal, and we must, therefore, affirm the judgment.

Filed Oct. 9, 1884.

No. 11,647.

CRIST *v.* STATE, EX REL. WHITMORE, DRAINAGE COMMISSIONER.

DRAINAGE.—*Complaint.*—*Assessment.*—*Exhibits.*—A complaint to enforce a ditch assessment under the act of April 8th, 1881, section 4273, *et seq.*, R. S. 1881, is insufficient upon demurrer for the want of facts, unless the assessment or a copy is filed with the complaint.

SAME.—*Assessment by Commissioner.*—Under such act the assessment made by the commissioner charged with the construction of the work is the basis of the action, and not the assessment made by the commissioners and reported to the circuit court.

SAME.—*Assessment by Commissioner of Land in Different Counties.*—Under such act the commissioner charged with the construction of the ditch is authorized to make all assessments concerning it, though some assessments are made upon lands in a county other than the one where the proceeding was instituted.

From the Grant Circuit Court.

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136	453

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170	613

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J. Brownlee, for appellant.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellee.

BEST, C.—This action was brought by the appellee to enforce a ditch assessment. A demurrer to the complaint for want of facts was overruled, and this ruling is assigned as error.

The first objection urged is that neither the assessment nor a copy is filed with the complaint. This objection seems well taken. The proceedings which resulted in this assessment were instituted in the Huntington Circuit Court, under the act of April 8th, 1881. The first four sections of this act authorize any person or persons to file a petition in the proper circuit court for the establishment of a ditch. This shall be referred to the commissioners of drainage, who shall, among other things, assess the benefits, etc., to each parcel of land affected, if any, report their proceedings to said court, and if there is no remonstrance within three days, or if the judgment shall be against the remonstrator, "the court shall also make an order declaring the proposed work established, and approving the assessments, and shall direct some one of the commissioners to construct and make the proposed work."

The fifth section provides that the commissioner charged with the execution of the work shall assess, from time to time, upon the lands benefited as adjudged by the court, such sums as he may deem necessary, not exceeding the above amount adjudged upon any one tract; that he may require the same to be paid in instalments not exceeding twenty per cent. per month, and if not paid he may "bring suit in the name of the State of Indiana, for his use as commissioner of drainage, in any court of competent jurisdiction, to enforce a lien upon any tract or tracts of land for the amount so assessed by him."

The assessment mentioned in this section is the assessment the commissioner is authorized to enforce, and while it is averred that such an assessment was made, neither the original

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nor a copy was filed with the complaint. A copy of the report of the commissioners made to the circuit court, and a copy of the order of the court declaring the proposed work established, were filed, but the assessment mentioned in these proceedings is not the basis of the suit, and, therefore, these exhibits could not supply the place of a copy of the assessment upon which the suit was brought. It is settled in this State that in a suit to enforce such lien a copy of the assessment must be filed, and, as it was not, the complaint was insufficient, and the demurrer should have been sustained. *West v. Bullskin, etc., Co.*, 19 Ind. 458; *Alkire v. Timmons, etc., Co.*, 51 Ind. 71; *Busenbark v. Etchison, etc., Co.*, 62 Ind. 314.

The further point is made that the commissioner of drainage of Huntington county had no authority to assess land affected by such ditch in Grant county. We think otherwise. The statute clearly authorizes the construction of a ditch affecting lands in different counties by a single commissioner of drainage. The second section requires the petition filed in the circuit court of the county, where "the lands of the petitioner or petitioners are situated." The third authorizes the court to refer the matter to the commissioners upon proof that notice has been given, etc., one of which must be "at the door of the court-house of each of the counties in which said lands are situated;" and the fourth requires the court to "direct some one of the commissioners to construct and make the proposed work." It being the duty of the commissioner to whom the work is assigned to construct the same, he has authority to assess all land affected, wherever situate, in accordance with the provision of the fifth section of said act. The construction of a ditch, under this statute, though it affects lands in different counties, must be deemed an entirety, and no commissioner of drainage, other than the one to whom the work is assigned, has any authority to construct any portion of it, or make any assessment in relation to it; all this must be done by the officer charged with its execution. There is, therefore, nothing in this objection. The failure to file a copy of the

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assessment with the complaint renders it insufficient, and for the error in overruling the demurrer for this reason the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instruction to sustain the demurrer to the complaint, with leave to amend.

Filed Sept. 27, 1884.

No. 11,248.

HIGHT ET AL., ADMINISTRATORS, v. TAYLOR.

PLEADING.—*Written Instrument.*—*Copy.*—Under section 362, R. S. 1881, it is only where a pleading is founded on a written instrument that "the original, or a copy thereof, must be filed with the pleading."

DECEDENTS' ESTATES.—*Allowance of Claim.*—*Collateral Security.*—*Assignment without Recourse for Collection.*—*Waiver.*—An allowance of a claim against a decedent's estate is not a lien on the estate, nor can its payment be enforced by execution; and where the decedent had, in his lifetime, assigned a policy of insurance on his life to his creditor, as collateral security for the payment of his debt, the creditor does not waive his right to the proceeds of such policy by procuring an allowance of his debt as a claim against the decedent's estate in the proper court, nor by his assignment without recourse of such policy to the decedent's administrator solely for the purpose of collection.

SAME.—*Evidence.*—In a suit by such creditor to recover of the decedent's administrator the proceeds of the policy so assigned, parol evidence is competent and admissible to show that the assignment of such policy, though absolute in form, was executed by the creditor without consideration and solely for the purpose of collection.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan, J. H. Loudon and R. W. Miers, for appellants.

J. D. Haynes, J. K. Thompson, J. R. East and W. H. East, for appellee.

Howk, J.—This was a suit by the appellee Mary M. Taylor against the appellants Hight and Handy, administrators

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of the estate of J. S. Smith Hunter, deceased, for the recovery of the proceeds of a certain policy of insurance, executed by the Continental Life Insurance Company, of Hartford, on the life of such decedent. The cause was put at issue and tried by the court, and, at the appellants' request, the court made a special finding of the facts and stated its conclusions of law thereon. The appellants excepted to the conclusions of law, and, over their motion for a new trial, the court rendered judgment thereon for the appellee.

The overruling of their demurrer to the complaint is the first error of which the appellants complain in this court.

In her complaint the appellee alleged that heretofore, on ———, she loaned to J. S. Smith Hunter, who was then in life, the sum of \$10,000, and took his promissory note therefor; that, at the time of taking such note, J. S. Smith Hunter held a policy on his life in the Continental Life Insurance Company for the sum of \$10,000, and he then assigned, by written endorsement thereon, such policy as security for the payment of his note, and delivered the same to the appellee, who held the same until thereafter alleged; that after the giving of such note and the assignment of such policy, to wit, on the 8th day of July, 1876, the said J. S. Smith Hunter departed this life, leaving said note unpaid, and, by his death, became entitled to the payment of said policy, subject to the payment of appellee's claim; that after the death of said Hunter the appellee filed her note in the court below, and by the judgment of the court her claim was allowed against the decedent's estate in the sum of \$10,000, which was then due and unpaid; that on the 9th day of September, 1876, Henry C. Duncan was duly appointed administrator of the estate of J. S. Smith Hunter, deceased, and that, while acting as such, the appellee, for no other consideration than for the purpose, and only purpose, of collecting said policy, assigned the same in writing by endorsement thereon to the said Henry C. Duncan, administrator as aforesaid, and to the estate of said decedent, for such collection; and that thereupon the said Duncan

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commenced suit in the circuit court of the United States for the collection of such policy.

And the appellee further alleged that afterwards, on the — day of July, 1878, the said Henry C. Duncan resigned his trust as such administrator, and the appellants Hight and Handy were duly appointed and qualified as administrators, and had been since and then were acting as the administrators of the estate of said J. S. Smith Hunter, deceased; that, as such administrators, the appellants had collected, by the judgment of United States Circuit Court, the sum of \$10,000 on such policy, and then had such money in their possession; and that, though demanded so to do, the appellants refused to pay such money over to the appellee in payment of her claim against said estate, allowed by the court below. Wherefore, etc.

It is claimed by the appellants' counsel that appellee's complaint is bad on the demurrer thereto, "for the reason that no copy of the policy, or of the assignments of the same, was filed with the complaint." This objection to the complaint is not well taken. Neither the policy, nor the written assignments endorsed thereon, can be regarded in any legal sense as the foundation of appellee's complaint; and under the statute, it is only when a pleading is founded on a written instrument that "the original, or a copy thereof, must be filed with the pleading." Section 362, R. S. 1881; *Anderson School Tp. v. Thompson*, 92 Ind. 556.

But appellants' counsel also insist that the complaint is bad because it shows that the court had previously allowed the appellee the amount due on her note, as a claim against the decedent's estate, and had assigned the policy to the administrator of the decedent for collection. We are of opinion, however, that the complaint is not bad on either of the grounds suggested by counsel. The allowance of her claim by the court gave the appellee no additional rights against the decedent's estate. The allowance did not become a lien on the estate, and its payment could not be enforced by execution.

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The statute declares that "No execution or other final process shall be issued on any allowance or judgment rendered upon a claim against a decedent's estate, for the collection thereof out of the assets of the estate." Section 2328, R. S. 1881; *Fiscus v. Robbins*, 60 Ind. 100; *Johnson v. Meier*, 62 Ind. 98. It can not be said, we think, that the appellee, by procuring such an allowance of her claim, waived her rights to the policy assigned to her by the decedent, in his lifetime, to secure the payment of such claim. Nor can it be correctly said, as it seems to us, that the appellee lost or waived her legal right to have the proceeds of the policy applied to the payment of her claim, by her assignment of such policy, without consideration and solely for the purpose of collection, to the former administrator of the decedent. In support of their position appellants' counsel cite *Alexander v. Alexander*, 64 Ind. 541, but an examination of that case will show that it is utterly unlike the case at bar.

The second error, of which the appellants' counsel complain in argument, is alleged error of the court in its conclusions of law, upon the facts specially found. In the special finding, the court found the facts to be substantially the same as those stated by appellee in her complaint, except that they were stated more fully and at length in the special finding than in the complaint. The appellee's assignment of the policy to Duncan, administrator of the decedent, is set out at length in the special finding of facts, in substance, as follows:

"VERSAILLES, IND., June 5th, 1877.

"This policy having been assigned as collateral security to me, and the debt being now secured by a judgment, I now assign the same to Henry C. Duncan, administrator of the estate of J. S. Smith Hunter, deceased, without any recourse whatever back on me. (Signed) MARY M. TAYLOR."

It is earnestly insisted by the appellants' counsel, that the appellee having procured an allowance of her claim against the decedent's estate, and having thus assigned the policy, unconditionally and without recourse, to the decedent's ad-

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ministrator, must be held to have surrendered and abandoned her claim to such policy as a security, and to be absolutely estopped from asserting or showing the contrary. We are not inclined to approve of or adopt the views of counsel on this point. We have already shown, we think, that the allowance of appellee's claim against the decedent's estate gave her no additional rights against such estate; and it will not do to say that her claim was secured by the judgment of allowance. It is manifest, therefore, upon the face of appellee's assignment of the policy to the administrator of the decedent, that it was executed by and through mistake. Appellee did not intend to surrender or abandon the policy as a security, except upon the ground, apparent in her assignment, that her claim was secured by the judgment of allowance. The fact that the assignment of the policy was executed by appellee, without any recourse on her, does not show conclusively that she thereby abandoned and surrendered the policy to the administrator of the decedent, nor preclude her from asserting and proving the actual facts in regard to her execution of such assignment. If the actual facts were, as the trial court found them to be, the court did not err in its conclusion of law, that the appellee was entitled to an order, requiring the appellants to apply the net proceeds of the policy, in their hands as administrators, to the payment of appellee's claim.

These views of the question, under consideration, practically dispose of the third error assigned by the appellants, namely, error of the court in overruling their motion for judgment in their favor on the special finding of facts. For, if the court did not err in its conclusions of law upon the facts specially found, as we decide that it did not, it is logically certain that it committed no error in overruling the appellants' motion for a judgment in their favor, upon such facts.

The last error of which the appellants complain is the overruling of their motion for a new trial. We will consider the causes assigned for such new trial in the order and manner

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in which the appellants' counsel have discussed them in their well-considered brief of this case. The first and second causes for a new trial were, that the special finding of the court was contrary to law, and was not sustained by sufficient evidence, and these causes are considered together. The evidence is properly in the record, and fairly tends, as it seems to us, to sustain the special finding of facts on every material point. In such a case it needs no argument nor citation of authorities to show that the finding of the trial court will not be disturbed, nor its judgment be reversed, upon the question merely of the weight or sufficiency of the evidence. Such has been the uniform holding of this court, upon the point under consideration, for many years; and we know of no sufficient reason for declaring a different rule in the case in hand. *Hayden v. Cretcher*, 75 Ind. 108; *Cornelius v. Coughlin*, 86 Ind. 461; *Johnston Harvester Co. v. Bartley*, 94 Ind. 131.

The third cause for a new trial was error of law, occurring at the trial, in permitting Edwin P. Ferris, a witness for appellee, "to testify as to the purpose for which the policy of insurance was assigned by the plaintiff to H. C. Duncan, and what was the understanding, whether the policy was assigned absolutely, or only for collection." The evidence of Ferris was admitted by the court, over the appellants' objection thereto that it was "illegal and incompetent." There was no error, we think, in the admission of Ferris's evidence.

The appellee was the sister of the decedent, J. S. Smith Hunter. She loaned Hunter, in his lifetime, \$10,000, for which he gave her his note; and to secure her in the payment of his note he assigned in writing and delivered to her the policy of insurance on his life. Afterwards he died, leaving his debt and note to the appellee wholly unpaid. Duncan became the administrator of the decedent's estate, and the witness, E. P. Ferris, Esq., became and was the attorney of the appellee, who placed in his hands for collection the decedent's note to her and the policy of insurance assigned to her to secure the payment of such note. Ferris testified

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that he wrote the assignment of the policy to Duncan, administrator, executed by the appellee, and heretofore set out in this opinion. We are of opinion that it was competent for the appellee to show by the witness what was the purpose of her assignment of the policy to Duncan, the administrator of her deceased debtor, and what was the understanding as to whether the assignment was absolute or only for collection. The evidence was competent, not for the purpose of contradicting the written assignment, but to show what was not apparent on the face of the assignment, namely, the object, purpose and intention of the parties in its execution. *Smith v. Ostermeyer*, 68 Ind. 432; *Sidener v. Pavey*, 77 Ind. 241, on p. 246; *Hewitt v. Powers*, 84 Ind. 295.

What we have said, in considering the third cause for a new trial, is applicable as well to the alleged error of law, which was assigned as the fourth cause for a new trial, namely, error of law, occurring at the trial, in overruling the appellants' motion to strike out the evidence of Edwin P. Ferris, the admission of which evidence, over their objections, was assigned by them as their third cause for a new trial. Of course, if the evidence of Ferris was competent and properly admitted, as we think it was, it follows of necessity that the court did not err in overruling the motion to strike out such evidence.

The fifth and sixth causes for a new trial are substantially the same, and present the same questions as the third and fourth causes, already considered. The fifth cause was error of law in permitting the appellee, as a witness in her own behalf, to testify in relation to her object and purpose in executing the assignment of the policy to Henry C. Duncan; and the sixth cause was error of law in refusing to strike out such evidence of the appellee. For the reasons given, in considering the third and fourth causes for a new trial, we are of opinion that the rulings of the court, complained of by the appellants as errors of law, in their fifth and sixth causes for a new trial, were neither of them erroneous. No

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other causes for a new trial were assigned by the appellants, and our conclusion is that the court committed no error in overruling their motion for a new trial.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Sept. 26, 1884.

No. 11,505.

ROBERTS ET AL. v. STATE, FOR THE USE OF JONES, COMMISSIONER OF DRAINAGE.

DRAINAGE.—*Lien for Ditch Assessments.—Complaint.—Copy of Assessment by Commissioner.—Exhibit.*—In a suit to enforce a lien for a ditch assessment under section 4275, *et seq.*, R. S. 1881, it is necessary that the assessment made by the commissioner charged with the execution of the work should be made the foundation of the suit, and either the original or a copy thereof filed as an exhibit.

From the Madison Circuit Court.

J. Brown and W. A. Brown, for appellants.

C. L. Henry and H. C. Ryan, for appellee.

BLACK, C.—The appellee sued the appellants to enforce a lien on certain land in Madison county for the amount of a ditch assessment made under the act of April 8th, 1881, section 4273, *et seq.*

The defendants demurred to the complaint for want of sufficient facts, and the demurrer was overruled. A demurrer to the joint answer of the defendants having been sustained they refused to answer further, and the court thereupon found and rendered judgment in favor of the plaintiff.

The complaint, which was filed on the 24th of May, 1883, alleged, among other things, that on the 15th of May, 1882, the commissioner charged with the execution of the work caused a notice, stating that the work had been established

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by the court and giving the several assessments of benefits to the several tracts of land therein named, including the land against which it was by this suit sought to enforce a lien, as had been confirmed by the court, to be filed and recorded in the recorder's office of said county; that he duly assessed upon said lands the whole amount of said benefits as adjudged against them by the court, the entire amount assessed being necessary for the construction of the work; and that said commissioner gave notice as required by law, by publication in a weekly newspaper named, published in said county, that he would and did require the entire amount of said assessments, and required them to be paid in instalments not exceeding twenty per cent. per month, at the times fixed and set out in said notice, "a copy of which said assessment is filed herewith, and made a part of this complaint." The exhibit thus referred to was the report of the commissioners of drainage to the circuit court, showing, with other matters, the assessments made by said commissioners to the several tracts of land to be affected by the proposed work.

The assessment which became a lien that might be enforced by suit was that made by the commissioner charged with the execution of the work. R. S. 1881, sections 4277, 4278. It was necessary to the sufficiency of the complaint that this assessment should be made the foundation of the suit, and that this assessment, or a copy thereof, should be filed with the complaint. *Crist v. State, ex rel. Whitmore, ante*, p. 389; *Shaw v. State, for the Use of Whitmore, ante*, p. 23.

For the failure of the complaint to exhibit the assessment sued on, the demurrer should have been sustained.

PER CURIAM.—It is ordered, on the foregoing opinion, that the judgment be reversed, at the costs of the appellee, and the cause is remanded, with instruction to sustain the demurrer of the defendants to the complaint.

Filed Oct. 11, 1884.

Froun v. Davis et al.

No. 11,594.

FROUN v. DAVIS ET AL.

PARTNERSHIP.—*Contract by One Member.*—*Liability of Firm.*—A contract by one partner to pay an employee stipulated wages binds such partners to pay for such services as may thereafter be rendered under such contract, though some of such services were rendered after a third person had become a co-partner in carrying on the business of the firm.

SAME.—*Evidence.*—*Payment.*—*New Trial.*—As the formation of such firm constitutes no defence for services thereafter rendered under such contract, and where, in an action therefor, under a plea of payment, the evidence fails to show that the services had been fully paid, a new trial will be granted.

INSTRUCTION.—*Harmless Error.*—An erroneous instruction, if harmless, will not warrant a reversal of the judgment.

From the Henry Circuit Court.

J. Brown and W. A. Brown, for appellant.

C. S. Hernly and H. Brown, for appellees.

BEST, C.—The appellant sued the appellees as partners under the firm name of "Davis Bros.," before a justice of the peace, alleging in his complaint that they were indebted to him in the sum of \$200, a balance due him for services rendered them from June 20th, 1882, to May 23d, 1883, under the following contract:

"Article of agreement between Davis Bros. of the first part, and John Froun of the second part, witnesseth: 1st. Said Davis Bros. agree to furnish said Froun steady work at two and one half dollars per day as long as they continue in the bent wood business, and, in case the business warrants it, increase said wages to three dollars. 2d. And said John Froun agrees to work for said Davis Bros. at said price, furnish his patterns for forms for bending, use his influence and have general charge of said bent wood business. 3d. In witness whereof, the said parties have hereunto set their names this 20th day of June, 1882.

DAVIS BROS.

"JOHN A. FROUN."

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Judgment was rendered by the justice for \$176.30; an appeal was taken by the appellees to the circuit court, a trial had and a judgment rendered for \$50. A motion for a new trial by the appellant was overruled, and this ruling is assigned as error.

This motion embraced many causes. Among them it was averred that the amount of the recovery was too small, that the verdict was contrary to the evidence, and that the court misdirected the jury.

The evidence is in the record by bill of exceptions, and the appellant's testimony shows that the appellees were engaged in the "bent wood business;" that under and in pursuance of said contract, he entered their service on the 22d day of June, 1882, and continued in such employment until the 23d day of May, 1883. This made for him a *prima facie* case, and imposed upon them the burthen of successfully disputing it or overcoming it with an affirmative defence. The latter was not seriously attempted, but the former is claimed. The fact that the appellant continued in such employment is not disputed, but the appellees insist that on the 13th day of July, 1883, they sold an interest in their business to one Leander Harvey, formed a partnership with him, and thereafter carried on such business under the name of "Harvey & Davis Bros.," of which the appellant had notice, and by reason of such fact the appellant only continued in their service under such contract until the formation of such partnership, and that thereafter he was in the service of such new firm, to whom he must look for services thereafter rendered. The evidence tended to show that the appellees, on the 13th day of July, 1882, sold one-third interest in their business to Harvey, formed a partnership with him, and thereafter carried on the business under the new firm name. No change was otherwise made; Harvey did not assume any control, nor did he in any manner participate in the transaction of the business. Thereafter, as before, the appellees managed the business, and the appellant continued to render his services under said con-

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tract as though no change had been made. In support of the appellees' theory, the court instructed the jury that if Harvey became a partner after the execution of the contract, and the appellant was notified or had knowledge of such change, he could not recover in this action for any services thereafter rendered. This was wrong. The appellant was not compelled to look to such new firm. The services were rendered under a contract with the appellees, and the mere fact, that some of them were rendered after another had acquired an interest in the business, neither cancelled the contract nor absolved the appellees from its obligations. The fact that the firm received the benefit of his labor did not necessarily render him its creditor, as one may legally obligate himself to pay for services rendered another. If the services were rendered under the contract, the appellees are liable for them, and it is wholly immaterial for whom they were rendered. The evidence strongly tends to show that all these services were not only rendered, but were received under such contract, and the mere fact of such subsequent partnership forms no obstacle to a complete recovery in this action.

The instruction, however, did not, as it seems to, injure the appellant. He concedes that he has received \$464.30 upon his services, and this is largely in excess of any sum due at the time of the formation of such partnership. As the jury found for him in the sum of \$50, it is manifest that they found that no such firm had been formed, or else they disregarded the instruction. In either event, of course, it did him no injury.

Upon the assumption that no such firm was formed, the verdict is contrary to the evidence, as it fails to show that the services in excess of \$464.30 had been paid. In the first week of January, 1883, there was due the appellant, according to the appellees' own version of the matter, \$95, and thereafter he was paid by checks, January 24th, \$130, March 31st, \$32, and May 21st, \$6.50. This was all that was paid him, according to this record, though he continued to serve them under such contract until the 23d of May thereafter. It is

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true that the last check reads "in full of account to date," but this, at most, is a mere receipt, that can not control the facts, especially as the appellant's attention was not called to this clause, nor did he notice it when he accepted the check. This defence does not, therefore, appear to have been established. As the formation of the new firm did not constitute a defence, and as payment, the only other defence interposed, was not shown, the appellant was entitled to a new trial, and for the error in refusing him one the judgment should be reversed.

PER CURIAM.—It is therefore ordered that the judgment be reversed, at the appellees' costs, with instructions to grant the appellant a new trial.

Filed Oct. 9, 1884.

No. 10,574.

SWEETSER v. MCCREA.

BILL OF EXCEPTIONS.—*Time Given to File.*—*Extension of.*—*Objection.*—

Waiver.—Where time is given beyond the term in which to prepare and file a bill of exceptions, the court can not grant an extension of such time at a subsequent term, over the objection of the adverse party; but if such party is present, and makes no objection to such extension of time, when it is granted, it will be held by the Supreme Court that, by his silence, he acquiesced in and tacitly consented to the extension of time and waived his right to object thereto.

SAME.—*New Trial.*—*Supreme Court.*—A cause for a new trial is not taken as true, and will not be considered by the Supreme Court unless the truth of the facts, assigned as such cause, is shown by bill of exceptions.

From the Wabash Circuit Court.

C. Cowgill, H. B. Shiveley and C. E. Cowgill, for appellant.
J. D. Conner and J. D. Conner, Jr., for appellee.

HOWK, J.—In this case the appellant, Sweetser, sued the appellee, McCrea, in a complaint of four paragraphs. As appellant's counsel say, however, that "the case was wholly

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tried under the averments in the second and third paragraphs," we need not notice the other paragraphs of the complaint. We take from the brief of appellant's counsel the following summary of the second and third paragraphs of the complaint:

"The second paragraph states that, on the 8th day of June, 1881, the appellant was the owner of a stock of dry goods in the city of Wabash, Indiana, of the cash value of ten thousand dollars; that on said 8th day of June he entered into a contract with appellee for the sale of said goods, the terms of which were as follows: That appellee should pay appellant, for said stock of goods, the sum of five thousand dollars, and after such sale and delivery of the goods the appellee and appellant should take an invoice of such stock of goods, and if the stock should, at a fair invoice, amount to more than five thousand dollars, he, the appellee, was to pay him, the appellant, the excess over and above five thousand dollars, whatever that might be. The paragraph contains the further statement that the sale was consummated on the terms and conditions stated and no other. The goods were delivered to appellee, and afterwards a demand made for the invoice and a refusal; and that the stock of goods was of the cash value of ten thousand dollars.

"The third paragraph is much the same as the second, except that it states that the sale was of a stock of goods and the store-room in which they were situated, for the gross sum of fourteen thousand dollars, with the condition that the stock of goods, after delivery, should be invoiced, and the excess, if any, over and above five thousand dollars, should be accounted for by the appellee to appellant; that on these conditions, and no others, the stock was delivered into the possession of the appellee; that afterwards the appellee refused to make an invoice and account to appellant for the excess over and above five thousand dollars, and that said stock was of the cash value of ten thousand dollars."

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below; and

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over the appellant's motion for a new trial judgment was rendered against him for appellee's costs.

The only error assigned by the appellant, upon the record of this cause, is the overruling of his motion for a new trial.

It is claimed by appellee's counsel, that the bill of exceptions, containing the evidence and the rulings of the court in relation to the evidence, was not filed within the time given, and therefore did not become a part of the record. Of course, if counsel are right in this position, that is an end of this appeal, and the judgment below must be affirmed. We are of opinion, however, that the claim of appellee's counsel on this point can not be sustained, and that the bill of exceptions is properly in the record. The claim of counsel is manifestly founded upon the fact that the record contains two entries or orders giving time to the appellant to prepare and file his bill of exceptions. The cause was tried and the verdict returned at the September term, 1881, of the court below, and at the same term the appellant's written motion for a new trial was filed, and immediately following this motion in the record, and of the same date, appears the following entry: "And ninety days are given plaintiff in which to perfect and file his bill of exceptions, and cause continued."

At the ensuing November term, 1881, of the court, the parties appeared and the court then overruled appellant's motion for a new trial, and sixty days were then given the appellant "in which to perfect and file his bill of exceptions herein," and then followed the judgment of the court, from which this appeal is prosecuted. The bill of exceptions was filed within the sixty days last given, but not within the ninety days first given. We have no doubt that the bill was filed in proper time and constitutes a part of the record. But if the court had erred in its last order, the appellee neither objected nor excepted to the time then given, and he is in no condition, therefore, to complain of such error. Even if the time last given must be regarded as an extension, merely, of the time first given, it must be held, we think, that the ap-

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pellee, by his silence and his failure to object at the proper time, acquiesced in and tacitly consented to such extension of time. *Wilson v. Vance*, 55 Ind. 394; *Northcutt v. Buckles*, 60 Ind. 577; *Trentman v. Swartzell*, 85 Ind. 443. We are of opinion, however, that the time last given was not intended as an extension of the time previously given; but that the court, upon overruling the motion for a new trial, then gave the appellant such time as was thought necessary to prepare and file his bill of exceptions, without reference to any order previously made, on the same subject. Within the time thus given, the bill of exceptions was prepared and filed, and such bill so filed, we think, is a proper part of the record. Section 629, R. S. 1881; *Loy v. Loy*, 90 Ind. 404; *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245.

It is not claimed by the appellant's counsel, in their brief of this cause, that the verdict of the jury was not abundantly sustained by the evidence. But counsel earnestly insist that the trial court erred in excluding from the jury certain relevant, material and competent evidence offered by the appellant. The exclusion of such evidence is the only matter of which appellant complains in argument, or for which he asks us to reverse the judgment below. It was incumbent on the appellant to show, by a fair preponderance of evidence, that the appellee had agreed to pay him for his stock of goods, not only the \$5,000 paid in cash, at the time of the sale and delivery of such goods, but also the excess if any in the value of the goods over and above such sum of \$5,000. In addition to his proof of such agreement, it also devolved on the appellant to prove, not only that the value of the stock of goods exceeded the sum of \$5,000, so paid in cash, but also the amount of such excess, or, in other words, the fair cash value of the stock of goods at the time of his sale and delivery thereof to the appellee, over and above the sum of \$5,000.

At the proper time, as shown by the bill of exceptions, the appellant offered to prove by the testimony of himself and

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another witness, that on the 14th day of January, 1881, prior to the sale to appellee, "a fair and careful invoice of the stock of goods was made, and that the same amounted to \$7,243.76, and that there was put into that stock afterwards and up to the time of sale to appellee, new goods to the amount of \$7,442.59, and that there had been sold out of said stock, for cash and credit sales, goods to the amount and value of \$5,618.60, leaving in such stock, at the time of sale to appellee, goods to the amount of \$9,067.75." Appellee's objections to the offered evidence were sustained and the evidence excluded by the court, and appellant excepted.

We have copied appellant's offer from the brief of his counsel, and of the ruling thereon they say: "The exclusion of this testimony was certainly an error of the court. How were the amount and value of the goods, in that stock, to be ascertained, if the proof offered by appellant was not proper? He had a right to make the proof and was, in fact, compelled to make it." Of course, under the allegations of his complaint, it was necessary for the appellant to prove that the value of his stock of goods, at the time of his sale and delivery thereof to the appellee, exceeded the sum of \$5,000, and the amount of such excess, if any, to entitle him to a recovery. The trial court recognized this necessity, on the part of the appellant, and permitted him to show, without objection from the appellee, by the testimony of himself and his son, that the value of the stock of goods, at the time of his sale and delivery thereof to appellee, exceeded the sum of \$5,000 from \$3,000 to \$4,000. But when the appellant offered to prove "that an invoice was taken and the result of that invoice," or "the amount of the invoice, on January the 8th last," the court very properly, we think, sustained the appellee's objections and excluded the offered evidence. It was not claimed nor pretended, that the appellee was, in any manner, a party to the invoice, or was present when it was made, or in any way participated in the preparation of such invoice. Surely, therefore, the court committed

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no error in excluding from the jury the evidence offered by the appellant, to prove "that an invoice was taken and the result of that invoice," or "the amount of the invoice, on January the 8th last," about five months before his sale to the appellee.

In his motion for a new trial, the appellant assigned as cause therefor, "error of the court in refusing to allow plaintiff, on cross-examination of James Bruner, defendant's witness (said witness having stated, upon his examination in chief, that said stock was broken, and that the goods, in large part, were old and of inferior quality and character), to ask such witness whether, between the time of taking said invoice, on the 14th day of January last, and the time of the sale to appellee, McCrea, there had not been purchased, and added to said stock, new goods to the amount and value of \$7,442.59?" It is a settled rule of practice in this court that the statement of facts as cause for a new trial, in the motion therefor, is not regarded here as true unless its truth is shown by a bill of exceptions properly in the record. *Hyatt v. Clements*, 65 Ind. 12; *Heckelman v. Rupp*, 85 Ind. 286; *Ireland v. Emmerson*, 93 Ind. 1 (47 Am. R. 364).

The bill of exceptions appearing in the record fails to show that the court refused to allow the appellant to ask the witness Bruner, on cross-examination, whether new goods had not been purchased and added to the stock, between the time of taking the invoice, on January 14th, 1881, and the date of the sale to the appellee. The bill shows that, instead of asking the witness Bruner any such question, the appellant proposed, on cross-examination, "to present through the witness forty-four bills of purchase of goods, made and put into that store from the *first* of January, up to the 8th day of June, 1881, amounting to something over \$7,000, as going to show there were also new goods in there, and, also, the character of the stock of goods on the day of the sale." To this offer or proposition the appellee objected, and the court sustained his objections.

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We are of opinion that the court did not err in excluding from the jury the "forty-four bills of purchase of goods" which the appellant offered "to present through the witness" Bruner. But whether the court did or did not err, it is certain, we think, that the ruling is not called in question by the cause assigned for a new trial in the appellant's motion; nor are the facts stated as such cause for a new trial shown to be true in or by the bill of exceptions.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 7, 1884.

No. 11,276.

YOUNG, TRUSTEE, v. WELLS, COMMISSIONER OF DRAINAGE.

DRAINAGE.—*Notice.*—*Jurisdiction.*—*Highways.*—In proceedings for drainage under R. S. 1881, sections 4273–4284, the fact that the circuit court referred the petition to the commissioners of drainage will, as against collateral attack by persons whose lands are mentioned in the petition, be conclusive that the proper notices were posted. *Aliter* as to those who have not been named, and whose lands have not been described in the petition, and as to assessments for benefits to highways when the petition did not mention such highways.

From the Hamilton Circuit Court.

G. H. Gifford and *R. B. Beauchamp*, for appellant.

J. M. Fippen, for appellee.

ZOLLARS, J.—In 1882 one Oliver Endicutt filed a petition in the Hamilton Circuit Court for the location and construction of a ditch, partly in Hamilton and partly in Tipton counties. Such proceedings were thereafter had upon the petition that the commissioners of drainage in Hamilton county made and filed their assessment of benefits, in which they assessed against Cicero township, in Tipton county, \$350, on account of benefits to three designated highways in that

97	410
141	436
142	843

97	410
152	578

97	410
165	289

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township. The assessment was approved by the court, the proposed ditch was established, and appellee, as one of the commissioners of drainage in Hamilton county, was directed to construct the ditch. He made out the proper notice, and had it and a copy of the assessment recorded in the recorder's office of Tipton county. To enjoin the collection of this assessment, appellant, as the trustee of the township, instituted this action.

A demurrer was sustained to the complaint. This ruling is assigned as error in this court. The proceedings were all had under sections 4273 to 4284, R. S. 1881, both inclusive. These must govern in the decision of the case, without reference to the amendments of 1883. If the assessment was otherwise valid, it was properly made against the township. Section 4281. It is conceded that this is a collateral attack upon the proceedings of the Hamilton Circuit Court, but it is contended that, as against the township, the proceedings are void for want of notice.

It is averred in the complaint, among other things, that before referring the matter to the commissioners of drainage, the court found that notices of the petitioner's intention to present the petition had been properly posted along the line of the ditch, and one at the door of the court-house in Hamilton county, and did not find that such notice had been posted at the door of the court-house in Tipton county.

This is a statement as to what the court found, but it is not a statement as to what the record of those proceedings shows. For aught that appears from this averment, the record may show that the court found that notices had been posted at the doors of the court-house in each of the counties, or it may be silent upon the subject. In either event, appellant could not be heard to contest the validity of the notice in this collateral assault upon the proceedings, by averring that it was not posted at the door of the court-house in Tipton county.

It is conceded that notice was given. Whether or not that notice was sufficient, by a proper posting, was a jurisdictional

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question, to be decided by the court before referring the matter to the commissioners of drainage, or taking further action. Where a decision is made in such a case, it is conclusive as against a collateral attack. The fact that the court assumed to exercise jurisdiction, and referred the matter to the commissioners, is proof of record that it determined that the notices had been properly posted, as required by section 4275, R. S. 1881. It was not necessary that the record should show by a specific statement that the notice had been posted at the doors of the court-house in each county. Where a court of general jurisdiction exercises jurisdiction, it will be presumed that it rightfully does so, and the judgment will be invulnerable as against a collateral attack, unless the record affirmatively show that the judgment is void. *Smith v. Hess*, 91 Ind. 424; *Houk v. Barthold*, 73 Ind. 21; *Iles v. Watson*, 76 Ind. 359; *Stoddard v. Johnson*, 75 Ind. 20; *Board, etc., v. Markle*, 46 Ind. 96. See, also, *Muncey v. Joest*, 74 Ind. 409; *Hume v. Little Flat Rock Draining Ass'n*, 72 Ind. 499; *Mullikin v. City of Bloomington*, 72 Ind. 161; *Board, etc., v. Hall*, 70 Ind. 469; *Ricketts v. Spraker*, 77 Ind. 371; *Miller v. Porter*, 71 Ind. 521.

So far, then, as concerns the posting of the notices, the record is conclusive against the appellant in this collateral assault upon it. It should be observed, too, that there is no averment in the complaint that a notice was not in fact posted at the court-house door in Tipton county.

There is, however, a more serious question. It is further averred in the complaint, that the notice and assessment, filed and recorded in the recorder's office in Tipton county, is the only notice or assessment that in any way mentions, describes, or refers to the township, or to the highways, or either of them; that neither the petition by Endicutt, nor the notices, nor affidavits made in proof of notice, nor any of the copies of the notices filed with the affidavits, nor the order of the court referring the matter to the commissioners of drainage, nor any of the records, entries, minutes, or orders made in the

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cause by the court, contain any mention, or describe in any manner whatever, any of the highways, nor contain any mention or reference to the township of Cicero, nor in any manner show that any notice whatever was given to any one through whom the township might have notice that the highways would be, or were likely to be, in any way affected by the proposed ditch, and that neither the township nor any of its officers had any notice of the proceedings until the notice and assessment were recorded in Tipton county.

The petition, at least, is a part of the record of the proceedings, in the Hamilton Circuit Court. What is averred of it may properly be said to be averred of the record.

As shown by the record, then, there is no mention in it, either of the township, its officers or the highways, until the filing of the assessments. As to all parties named in the petition, it may be said that the assuming of jurisdiction, and referring the matter to the commissioners, was an implied finding and decision that the notice was not only properly posted, but was in all other respects sufficient, and that that decision can not be controverted by any of the parties so named, in a collateral attack. But this, we think, can not be said of parties who are not named in the petition, and whose land is not in any way described or referred to in the petition. The court can not well be presumed to have passed upon the sufficiency of notice to parties who do not appear to be parties to the proceedings. It is fundamental, that persons are not concluded by an adjudication to which they are in no way parties, and of which they have had no notice. *Porter v. Stout*, 73 Ind. 3; *Campbell v. Dwiggin*s, 83 Ind. 473.

The authority to assess highways under this act is not very directly given. The first specific statement is in section 4281, R. S. 1881. Section 4274 required that the petitioner should give in his petition a description of the lands he believed would be affected, with the names of the owners, and state that the public health would be improved, or that one or more highways would be benefited by the proposed ditch.

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Section 4275 required that the commissioners of drainage should make a personal inspection of *the lands described in the petition*, etc., and assess the benefits or injury to each separate tract of land to be affected, and to easements therein held by railways or *other corporations*. Section 4281 required that any benefits assessed to any highway should be assessed against the proper township, and be paid by the trustee, etc.

These sections taken together, we think, authorize the assessment of townships for benefits to highways. It will be noticed that the statute required that the lands to be affected should be described in the petition, with the names of the owners, and that in their inspection and assessments the commissioners were limited to the lands so described. The form prescribed provides for a like description to be given in the notice, with the names of the owners.

We need not now decide whether or not a notice might be sufficient which names the owner of land to be affected without giving a description of his land, or gives a description of the land to be affected without giving the name of the owner, but it seems very clear that there is no authority for notice to any one who is neither named in the petition, nor his land therein described. A party will not be concluded by an adjudication to which he has in no way been a party, although an unauthorized notice may have been served upon him. To hold the contrary would be to hold that the description of one tract of land in the petition, with the name of the owner, would authorize notice to, and assessments against, any number of others.

It seems clear, too, that under this statute the notice, to be binding upon a land-owner, must either contain his name or a description of his land, if not both. If it contains neither, how is he to know that benefits will be, or are likely to be, assessed against his land? Without his name or a description of his land, the notice conveys no warning to him that proceedings are about to be had in court which may affect his rights. A notice without these is no notice at all to him, and

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an assessment upon such a notice is an assessment without notice, and hence void.

The action of the Legislature supports our construction of the statute. At the session of 1883, section 3, act of 1881, section 4275, R. S. 1881, was amended. Acts 1883, p. 174. In this amendment it is provided that when lands are named in the report of the commissioners of drainage as affected by the proposed ditch, which are not named in the petition, a time shall be fixed by the court for hearing the report, and the petitioner shall give notice to the owners of such lands. Although the statute is somewhat indefinite upon the subject, we think that as there must be a description of the lands, or the names of the owners, if not both, in the petition and notice, so there must be in the petition and notice some kind of description or designation of the highways, for benefits to which assessments are to be made against the township, or a naming of the township, if not both, so that the officers and agents of the township may have notice, opportunity and time to defend the township against any contemplated or possible assessment. The demurrer was an admission of the truth of the averments of the complaint, and thus an admission that the record of the proceedings in the Hamilton Circuit Court shows affirmatively, that the court did not have jurisdiction to order or confirm any assessment against Cicero township. The assessment made is, therefore, void, and the demurrer to the complaint should have been overruled.

This conclusion is in harmony, and not in conflict, with the cases above cited. The case of *Scott v. Brackett*, 89 Ind. 413, cited by appellant, is authority here for a strict construction of the statute, but it is not conclusive upon any question involved here, because this is a collateral, and that was treated as a direct attack upon the proceedings.

The judgment is reversed, with costs, with directions to the court below to overrule the demurrer to the complaint.

Filed Sept. 25, 1884.

The State, *ex rel.* McCalla, v. The Burnsville Turnpike Company *et al.*

No. 10,850.

THE STATE, EX REL. MCCALLA, v. THE BURNSVILLE TURN-
PIKE COMPANY ET AL.

MANDAMUS.—*Issue of Fact.*—*Right of Trial by Jury.*—An issue of fact, in mandate, must be tried by jury if either party demands it, the proceeding being at law, and not in equity

From the Bartholomew Circuit Court.

J. C. Orr, for appellant.

N. R. Keyes, for appellees.

NIBLACK, J.—This was an application in the name of the State, and on the relation of Charles McCalla, for an alternative writ of mandate against the Burnsville Turnpike Company, Joel S. Davis, William H. Hunter and John H. Reddenbaugh, Davis being the president, Hunter the secretary, and Reddenbaugh the treasurer, of that company.

The complaint averred that the defendant, the Burnsville Turnpike Company, was a corporation organized under the laws of Indiana, and engaged in operating a turnpike road in Bartholomew county; that it was the duty of the defendant, the secretary of said company, to collect the moneys due said company from the shareholders thereof, to issue certificates of stock to the shareholders, and to transfer on the books of said company, in accordance with the by-laws thereof, any and all shares of stock to the name and credit of the actual and lawful owner thereof on the surrender of the certificate of said stock; that in July, 1877, one Isaac Davis subscribed for four shares of the capital stock of said corporation at \$50 per share, on the terms offered by said company to wit: Said Davis as such subscriber was required to pay for said four shares of stock in five instalments of \$40 each, the first instalment to be paid in cash at time of subscription, and the remaining instalments to be paid in one, two, three and four years from time of subscription; that the said Isaac Davis, after having paid the first instalment, died, and his widow,

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Nancy E. Davis, took said stock from his estate ; that on August 13th, 1879, the second and third of the instalments on said shares being due and unpaid, the plaintiff's relator, at the request of Nancy E. Davis, the then owner, paid the instalments then due, and said Nancy E. Davis executed her notes for the remaining instalments, on which the relator became surety ; that the shares were then transferred to her, said Nancy E. Davis, and she received a certificate thereof ; that thereafter it was agreed between said Nancy E. Davis and the relator that the relator should pay said Nancy \$40 in cash and assume the payment of her notes to the company and she would assign and transfer the shares and the certificate thereof to relator ; that said relator paid said Nancy the \$40, and she transferred and assigned and delivered to him the said shares and the certificate thereof, and that relator paid the first of the notes which he assumed to pay when it became due ; that the other note which relator assumed to pay was not yet due, but he was able and willing and ready to pay it when due ; that the relator is the legal and equitable owner of said shares, and in the rightful possession of the certificate thereof, and entitled to have the said shares transferred to him on the books of said corporation ; that relator on the 10th day of March, 1881, in accordance with the by-laws of said company and requirements of said certificate of said shares, offered to and did surrender to the said company and its officer, the secretary, and thereupon demanded of said officers of said company and the said secretary in particular that said shares be transferred on the books of said corporation to the name of relator, but said officers and said secretary and each of them refused and still refuse to transfer said shares to relator on said company's books, to relator's great injury. Wherefore plaintiff prayed an alternative writ of mandate commanding the said Burnsville Turnpike Company, and the said officers thereof, and said secretary in particular, to perform said acts of transfer of said stock on the

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books of said corporation to this relator, so wrongfully omitted and refused as aforesaid, or to show cause why they should not be compelled to perform the same by a peremptory writ, and that plaintiff have all other relief in this behalf necessary.

An alternative writ was accordingly issued, to which the defendants made return in three paragraphs.

The first paragraph was held to be sufficient upon demurrer, but demurrers were severally sustained to the second and third paragraphs.

The first paragraph of the return for answer charged that it was agreed between McCalla, the relator, and the above named Nancy E. Davis, that said McCalla should advance the money necessary to pay off the indebtedness against the stock and hold the certificate thereof, and when the money paid on the stock by said McCalla should be refunded to him, he should return the certificate to said Nancy; that said McCalla advanced the money, and said Nancy delivered to him the certificate as security for the advancement; that the stock remained on the books of the company in the name of said Nancy E. Davis, and she performed the functions of a stockholder in relation thereto; that in March, 1881, said Nancy, at a public sale of her effects, offered the said shares of stock for sale, and the Burnsville Turnpike Company bought the shares at said sale, and before the commencement of this action tendered to McCalla \$170 in full of the amount he had paid for said Nancy thereon, which sum the defendants brought into court for the said McCalla.

The plaintiff replied in general denial of the facts contained in this paragraph of return. When the cause was called for trial, the relator, in his own behalf, as well as on behalf of the State, demanded that a jury be impanelled to try the matters in controversy between the parties, but the court overruled the relator's demand, and proceeded with the trial of the cause without the assistance of a jury. After hearing the evidence, the court made a finding for the defendants, and,

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over a motion for a new trial, refused to award a peremptory writ of mandate.

Complaint is first made of the refusal of the circuit court to submit the cause to a jury for trial, and to the question raised by that decision the efforts of counsel have been principally directed.

The writ of mandamus is, in this country, classed amongst the extraordinary legal remedies. It was originally a prerogative writ issued only from the court of king's bench, a common law court, where the sovereign was considered to be personally present, to prevent the failure of justice, and to enforce the performance of a duty in which the complaining party had some interest. It was awarded only where there was no other adequate legal remedy, and the granting or refusing the writ was a matter resting in the sound discretion of the court.

While in England, and even in this country, this writ still retains some of its prerogative features, various statutory enactments have so far modified it as to place the proceedings, necessary to secure its benefits, very much upon the footing of an ordinary action. 5 Wait Pr. 548; 4 Wait Actions and Def. 357; 3 Bouvier Institutes, 93.

In the first section of his work on Extraordinary Legal Remedies, High says: "The modern writ of mandamus may be defined as a command issuing from a common law court of competent jurisdiction, in the name of the State or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law. In the specific relief which it affords, a mandamus operates much in the nature of a bill in chancery for specific performance, the principal difference being that the latter remedy is resorted to for the redress of purely private wrongs, or the enforcement of contract rights, while the former generally has for its object the performance of obligations arising out of

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official station, or specially imposed by law upon the respondent." See, also, section 5 of the same work.

Notwithstanding the analogy existing between the relief sometimes afforded by writs of mandamus and the object sought to be attained by certain suits in chancery, the fact nevertheless remains that proceedings in mandamus are of common law origin, and that the writ of mandamus is a common law remedy. 3 Blackstone's Com. 109.

In the case of *Brower v. O'Brien*, 2 Ind. 423, this writ was held to be a civil remedy. Section 1167, R. S. 1881, confers upon the Supreme Court and the circuit courts of this State power to issue writs of mandate, which is, in fact, but another name for writs of mandamus.

Section 1171 of the same statutes provides: "Whenever a return shall be made to any such writ, issues of law and fact may be joined; and like proceedings shall be had for the trial of issues and rendering judgment as in civil actions."

Section 1172 further provides: "In case a verdict shall be found for the plaintiff, * * or if judgment be given him, he shall recover damages as in an action for a false return, * * and a peremptory writ shall be granted without delay."

In proceedings like the one before us, the alternative mandamus stands as the complaint, and the return constitutes the answer. *Board, etc., v. State, ex rel.*, 61 Ind. 379; *Gill v. State*, 72 Ind. 266; *Potts v. State, ex rel.*, 75 Ind. 336; *Pfister v. State, ex rel.*, 82 Ind. 382; *State, ex rel., v. Board, etc.*, 92 Ind. 133; *Matter v. Stout*, 93 Ind. 19; 5 Wait Prac. 577.

As deducible from the authorities, it may be accepted as an established rule of proceeding, that when the facts are admitted, the relator's right to a peremptory mandamus becomes a question of law, to be disposed of upon motion, and in the sound discretion of the court, but that where an issue of fact has been formed upon the return, such issue must be tried and determined before final judgment can be rendered.

Wait's Practice, already cited, in vol. 5, and at page 590, says: "After an alternative writ is granted, a return made

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thereto and issues of facts joined thereon, the case becomes an action under the code and is not a special proceeding. *People v. Lewis*, 28 How. 159; S. C. affirmed, mentioning this point, 28 How. 470; 3 Abb. Ct. App. 537, and the issues involved in the cause are disposed of as in personal actions. In case of disputed facts upon the pleadings, those questions must, on proper issue made, go to the circuit for trial. *People v. Commissioners, etc.*, 7 Wend. 474." The doctrine thus stated is equally applicable to proceedings for mandamus in this State, the code of New York, to which reference is made, being similar to ours on the subject of issuing and enforcing writs of mandamus. When, therefore, under our code, as in this case, an issue of fact is found upon the matters contained in the return to an alternative writ of mandate, it stands for trial as in an ordinary civil action in which a jury may be demanded by either party. The circuit court, consequently, erred in overruling the relator's demand for a jury, and as the error is one for which the judgment will, in any event, have to be reversed, we will not now consider some other questions referred to in argument.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Filed Oct. 7, 1884.

No. 11,507.

O'DONOVAN v. CHATARD.

CHURCHES.—Jurisdiction.—No suit can be maintained by a priest of a Catholic church against his bishop for removing him from his office of priest, the civil courts in such cases having no authority to inquire as to the rightfulness of ecclesiastical decision.

From the Superior Court of Marion County.

R. Hill and *J. W. Nichol*, for appellant.

T. A. Hendricks, *A. W. Hendricks*, *C. Baker*, *O. B. Hord*,
A. Baker and *E. Daniels*, for appellee.

97	421
158	210

97	421
1171	116

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FRANKLIN, C.—Appellant brought this action against appellee to recover damages, alleging in his complaint, as a cause therefor, that appellee, as bishop in the Catholic church of the proper diocese, had, without jurisdiction and without just cause or provocation, removed appellant as priest in said church, at Brownsburg, Hendricks county, Indiana.

On motion of appellee parts of the complaint were stricken out, and then a demurrer was sustained to the remainder of the complaint, and judgment was rendered for appellee. On appeal to the general term of the court, the judgment of the special term was affirmed.

The question presented by counsel in this court is, can a priest in the Catholic church maintain an action in the civil courts against the bishop for simply removing him from office?

Appellant, in his brief, says: "Had appellant been charged with heresy in faith or practice, or the violation of any rule of the Catholic church, under well settled rules, civil courts would not have heard his complaint, but would have remitted him to his church judicatories, reminding him that when he became a priest in the Catholic church he had agreed to submit such controversies to the decision of these tribunals."

This being true, can the priest raise an issue with his bishop, and submit to the civil courts, whether the action of the bishop in matters of discipline and church government was right or wrong, reasonable or unreasonable, wise or unwise, and have the opinion of a jury upon that subject?

In the case of *Watson v. Jones*, 13 Wall. 679, it is said, on page 728: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of

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any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."

In the case of *Grimes v. Harmon*, 35 Ind. 198, 254, (9 Am. R. 690) it was held: "That over the church, as such, the legal tribunals do not have, or profess to have, any jurisdiction whatever, except to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatures to which they have voluntarily subjected themselves. But the civil courts will interfere with churches and religious associations, and determine upon questions of faith and practice of a church when rights of property and civil rights are involved."

In the case of *Chase v. Cheney*, 58 Ill. 509 (11 Am. R. 95), it was held, that the constitution guarantees "from all interference by the State, not only each man's religious faith, but his membership in the church, and the rights and discipline which might be adopted. The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the State, shall not be justified. Freedom of religious profession and worship can not be maintained, if the civil courts trench upon the domain

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of the church, construe its canons and rules, dictate its discipline, and regulate its trials."

In the case of *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 136, it is said, on page 151: "Civil courts in this country have no ecclesiastical jurisdiction. They can not revise or question ordinary acts of church discipline, and can only interfere in church controversies where civil rights or the rights of property are involved. Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction. The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong. When a person becomes a member of a church he becomes so upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are invaded. This doctrine inevitably results from that total separation between church and state which exists within the limits of the United States, and is essential to the full enjoyment of the guaranteed rights of American citizenship. Very naturally a different rule prevails in England, where church and state are united."

In the case of *German Reformed Church v. Seibert*, 3 Pa. St. 282, it is said on page 291: "The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their

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judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals."

In the case of *Shannon v. Frost*, 3 B. Mon. 253, it is said: "This court, having no ecclesiastical jurisdiction, can not revise or question ordinary acts of church discipline or excommunication. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. And these we must decide, as we do all other civil controversies brought to this tribunal for ultimate decision. We can not decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church. * * * The judicial eye of the civil authority of this land of religious liberty, can not penetrate the veil of the church, nor can the arm of this court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excinded members. When they became members they did so on the condition of continuing or not, as themselves and their church might determine. In that respect they voluntarily subjected themselves to the ecclesiastical power, and can not invoke the supervision or control of that jurisdiction by this or any other civil tribunal."

The Supreme Court of Illinois, in the case of *Ferraria v. Vasconcellos*, 31 Ill. 25, adopts and approves this language of the Kentucky court. See, also, *Bouldin v. Alexander*, 15 Wall. 131.

In the case of *Fitzgerald v. Robinson*, 112 Mass. 371, where an action was brought by a parishioner against a priest on account of excommunication, it was held that, "If the defendant was competent to pass sentence of excommunication, we can not inquire into the grounds and regularity of the proceedings." See, also, *Grosvenor v. United Society*, 118 Mass. 78.

In the case of *State of New Jersey v. Rector*, 28 Alb. L. J. 111, it was held that courts of law will interpose to control the

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proceedings of ecclesiastical bodies when a right to property is involved, but in no other instance.

In the case of *Chase v. Cheney, supra*, it is said on page 535: "We have no right, and, therefore, will not exercise the power, to dictate ecclesiastical law. We do not aspire to become *de facto* heads of the church, and, by construction or otherwise, abrogate its laws and canons. We shall not inquire whether the alleged omission is any offence. This is a question of ecclesiastical cognizance. This is no forum for such adjudication. The church should guard its own fold; enact and construe its own laws; enforce its own discipline; and thus will be maintained the boundary between the temporal and spiritual power."

In the case of *Gaff v. Greer*, 88 Ind. 122 (45 Am. R. 449), this court approved the rule announced in the case of *Shannon v. Frost, supra*, and adds, "The same rule is asserted in the following cases: *State, ex rel., v. Farris*, 45 Mo. 183; *Robertson v. Bullions*, 9 Barb. 64, 134; *German, etc., Church v. Seibert*, 3 Pa. St. 282; *Gibson v. Armstrong*, 7 B. Mon. 481; *Harmon v. Dreher*, 1 Speer Eq. 87." And it is further said, that "These authorities establish the proposition that the decision of one of these judicatories is binding upon the courts where such questions arise. It is said, however, that the appellants had no notice, and for that reason the order is a nullity. This was a question for the presbytery."

In the case of *Chase v. Cheney, supra*, it was further held that the civil courts will interfere with churches and religious associations when the rights of property or civil rights are involved, but will not revise the decisions of such associations upon ecclesiastical matters, merely to ascertain their jurisdiction; also, that the decisions of the ecclesiastical courts are final as to what constitutes an offence against the discipline of the church. In the dissenting opinion the question of jurisdiction, as decided, is stated as follows: "We understand the opinion as implying, that in the administration of ecclesiastical discipline, and where there is no other right of

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property involved than the loss of the clerical office or salary, as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts."

The case of *Connitt v. Reformed, etc., Church*, 4 Lans. 339, approved the rule established in the case of *Chase v. Cheney, supra*. And in that case it is further said: "We can not fail to see, I think, that in this case the *pastoral relation* established between Mr. Connitt and the church of New Prospect, was as purely ecclesiastical as that in which he stood as minister in the Reformed church, of America. His rights and duties as minister, and as pastor, were ecclesiastical, not civil; and the ecclesiastical tribunals of the Reformed church, of America, alone could suspend or depose him from the ministry, or dissolve the relations which existed between him and the church, as pastor and people. His duties as minister, when placed over this church, were of a character peculiarly within the cognizance of the authorities of the church organization to which he belonged, and were to be performed in pursuance of the rules and usages of that organization; as minister and pastor he was amenable to no other organization; and such organization, through its different instrumentalities, consistory, classes, and synods, had entire control of both pastor and people in all ecclesiastical matters. The secular courts have no jurisdiction over the ecclesiastical rights of either pastor or people, and neither can resort to those courts for the protection or enforcement of such rights. * * Now, inasmuch as the relation in question is not a civil one, dependent upon municipal law, but wholly ecclesiastical, and wholly dependent upon ecclesiastical rule, and its administration, by the church judicatories, it is not for this court to review the decisions and judgments of such church judicatories. Over them, and the administration of their rules and usages, we have no jurisdiction. No civil right is infringed by them in dissolving the pastoral relation. Mr. Connitt has no right to

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the continuance of such relation, cognizable in the civil courts, and, consequently, any wrong done him by the church courts, in its dissolution, is not one cognizable by the civil courts, either in an original or appellate proceeding. The rights to salary, etc., it is true, is, by contract, made dependent upon the continuance of the pastoral relation. But this does not bring such continuance within the cognizance of the civil courts. They can inquire only into the fact of the continuance. The relation is, nevertheless, controlled by the ecclesiastical authorities; and the fact of their dissolution of it is conclusive." See the cases of *Dutch Church v. Bradford*, 8 Cow. 457, and *Robertson v. Bullions*, *supra*.

In the complaint under consideration, it is shown that the plaintiff was notified by the defendant that his case would be submitted to the diocesan councillors. But plaintiff insists that he was not notified that any charges had been preferred against him, or of the time and place of their hearing, as is required by the "*instructio*." But thereafter, to wit, on the 2d day of December, 1880, the plaintiff was served with official notice by said defendant that his case for the non-payment of \$300, with interest, to said Hart, so claimed to be due as aforesaid from said congregation of St. Malachi's church, had been by him referred to the diocesan committee, and that on December 1st, 1880, the diocesan councillors had decided adversely to plaintiff, and that in consequence thereof said defendant informed plaintiff that unless said sum of \$300, with interest due, should be paid to said Hart within two weeks from said 1st day of December, 1880, plaintiff would cease *ipso facto* to be rector of the congregation of Brownsburg, and likewise all plaintiff's faculties, of every nature, as such priest or rector, would also cease. That he failed to pay the money within the time, and the defendant removed him from his said clerical office of priest and rector, and deprived him of all the benefits and emoluments thereof.

The complaint shows an adjudication of the plaintiff's case

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by the proper ecclesiastical authorities of the church to which he belonged, and, according to the foregoing authorities, it is not for this court to inquire whether that adjudication was regular or irregular, right or wrong; it is final in the premises. Another case between these same parties, growing out of the same transaction, and in relation to the church property, has heretofore been before this court. *Chatard v. O'Donovan*, 80 Ind. 20 (41 Am. R. 782). In the conclusion of the opinion in that case this court said: "We are, however, of the opinion that the relation of the parties was more like that of master and servant—the possession of the priest being, in fact, the possession of his superior, the bishop, who had power, at any time and upon his own judgment or discretion, to remove one and instal another in the office of pastor, and in the possession of the property of the office."

If master and servant was the true relation between the parties, the master certainly had the right to dissolve that relation, without giving the servant a right to an action in the civil courts for its mere dissolution; or, if the bishop had discretionary powers to remove the priest, clearly no action at law would lie for the exercise of such discretionary powers.

Viewing this case in all the lights surrounding it, we see no principle of the law upon which this action can be maintained.

There is no error in striking out parts of the complaint, or in sustaining a demurrer to it. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the general term of the court below be, and it is in all things affirmed, with costs.

Filed Sept. 25, 1884.

No. 11,339.

SELLER v. JENKINS.

SLANDER.—*Words Actionable.*—*Public Indecency.*—Words, which in their common acceptation, taken as a whole, charge the crime of public indecency as defined by the statute, are actionable *per se*.

SAME.—*Slandorous Words.*—In order that words should be slanderous, it is not necessary that they should describe the offence with technical accuracy; it is sufficient if the words uttered are such as convey to the minds of the hearers an imputation of a crime.

SAME.—*Words.*—*Provincial Meaning.*—*Pleading.*—Where words have a provincial meaning, that meaning must be averred as a substantive fact, and the ordinary meaning of words can not be changed by a mere innuendo.

EVIDENCE.—*Witness.*—*Impeachment.*—A witness may be contradicted by evidence showing that he has made statements directly relevant to the subject-matter of the action, contradicting the testimony given on the witness stand, but he can not be impeached by contradiction upon merely collateral matters.

SAME.—*Effect of Evidence of Contradictory Statements.*—Evidence of contradictory statements extends no further than the question of credibility; it does not tend to establish the truth of the matters embraced in the contradictory statements.

SAME.—*Cross-Examination.*—A witness may be impeached upon statements made by him on cross-examination, when such statements are not as to merely collateral matters.

SAME.—*Degree of Contradiction between Statements out of Court and Testimony in Court.*—There must be contradiction between the statements out of courts and the testimony of the witness, in order to make the impeaching evidence competent, but the degree of contradiction does not determine the competency of the impeaching evidence.

From the Montgomery Circuit Court.

J. Wright and *J. M. Seller*, for appellant.

G. W. Paul, *M. D. White* and *J. E. Humphries*, for appellee.

ELLIOTT, C. J.—It is an indictable criminal offence for a man to make an indecent exposure of his person in a public place and in the presence of other persons, and such an offence is punishable by imprisonment. *Arderly v. State*, 56 Ind. 328. Where the defendant utters words charging the plaintiff with an indictable offence punishable by imprisonment, the words are, as a general rule, deemed slanderous

97	430
133	246
97	430
142	655
97	430
144	468
147	372
97	430
154	320
154	821
156	296

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per se, and we think that this rule applies where the words impute to the plaintiff the offence of public indecency under our statute. *Gibbs v. Dewey*, 5 Cow. 503; *Brooks v. Harrison*, 91 N. Y. 83; *Lemons v. Wells*, 78 Ky. 117; *Wilcox v. Edwards*, 5 Blackf. 183. The offence of public indecency subjects the person guilty of it to a degrading corporal punishment, and is, in itself, an offence involving moral turpitude, and words charging such an offence have always been held to be actionable *per se*. 2 Leigh's N. P. 1350; *Onslow v. Horne*, 3 Wils. 177; Starkie Slan. 41.

It is not necessary that the words uttered should be such as describe the offence imputed by them with technical accuracy. *Wilson v. McCrory*, 86 Ind. 170. It is, however, necessary that the words uttered should be such as convey to the minds of the hearers an imputation of a crime. If the words used are such as produce upon the minds of those who hear them an impression that the plaintiff was guilty of a crime, they are actionable, although they may not fully describe an offence. *Drummond v. Leslie*, 5 Blackf. 453. If the words taken altogether are such as in their popular or ordinary signification charge a crime, then they are slanderous *per se*. *Morgan v. Livingston*, 2 Rich. 573; *Cass v. Anderson*, 33 Vt. 182; *Colman v. Godwin*, 3 Dougl. 90 (2 B. & Cr. 285). Where the words used have a provincial meaning, and it is that meaning that gives the words the force and effect of charging a crime, then that provincial meaning must be averred as a traversable fact. *Stucker v. Davis*, 8 Blackf. 414; *Harper v. Delp*, 3 Ind. 225; *Dodge v. Lacey*, 2 Ind. 212; *Rodebaugh v. Hollingsworth*, 6 Ind. 339; *Jones v. Diver*, 22 Ind. 184; Odgers Libel and Slan. 110. An innuendo can not change the ordinary meaning of language, and if the language used is not susceptible of the meaning ascribed to it, the pleading is not aided by the statements of the innuendo. *Hays v. Mitchell*, 7 Blackf. 117; *Miles v. VanHorn*, 17 Ind. 245; *Ward v. Colyhan*, 30 Ind. 395; *Hart v. Coy*,

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40 Ind. 553; *McFadin v. David*, 78 Ind. 445; S. C., 41 Am. R. 587; *Pollock v. Hastings*, 88 Ind. 248.

There is no allegation in the complaint before us that the words had a provincial meaning, and as the meaning of the words can not be changed by innuendo, the complaint must be adjudged bad, unless the words can be held to bear the meaning ascribed to them by the pleader. In determining what meaning the words alleged to constitute a slanderous charge shall have, it is proper to consider the entire statement, and not merely detached parts of it, and it is also proper to consider the circumstances under which they were uttered. *Townshend Slan. and Libel*, 181, 186. The question is, not what meaning the defendant intended to convey, but what meaning did the words, taken as a whole and considered with reference to the transaction of which they were spoken, convey to the minds of those who heard them? *Odgers Libel and Slan.* 93, 99; *Branstetter v. Dorrough*, 81 Ind. 527. The defamatory words alleged to have been spoken by the defendant are thus set forth: "I saw something I never saw before; I saw a drunken Quaker; it was Jenkins, Jane Cox's son-in-law (meaning this plaintiff, who is a son-in-law of Jane Cox, and who is called a Quaker); he (the plaintiff meaning) was down at Marcus Mote's mill (meaning Marcus Mote's mill in Smartsburg, Montgomery county, Indiana, and is a public place), and was drunk; there were two women in the wagon, and he (plaintiff meaning) took his old root out and pissed before the women (meaning that plaintiff took out his penis and did then and there urinate in the presence of the women and did make an indecent exposure of his person.)" Taking all the language used into consideration, we think that it charges the commission of an act of public indecency by an indecent exposure of the person. It is true that the word "root" does not signify the male organ of generation, but when this word is considered in connection with the words with which it is associated, it is plain that the meaning conveyed to the hearers was, that an indecent exposure of a pri-

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vate part of the person had been made. The word "pissed" has a definite and well known meaning, and describes the act charged to have been done by the plaintiff in such a way as to plainly convey to the hearers the speaker's meaning, and in describing what was done this term so clearly affixed a meaning to the words with which it was associated that those who heard could not have been in doubt as to the part of the person the plaintiff was charged with having exposed. In *Com. v. Kneeland*, 20 Pick. 206, Chief Justice SHAW said: "If therefore obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import, and the sense in which it was intended, to be gathered from the context, and from all the facts and circumstances under which it was used." *Vanderlip v. Roe*, 23 Pa. St. 82; *Dellevene v. Percer*, 9 Dowl. P. C. 244; *Branstetter v. Dorrough*, 81 Ind. 527, *vide* auth., p. 529.

The general rule is that a cross-examination must be confined to the subject-matter of the direct examination, but this rule does not apply where questions are propounded for the purpose of laying the foundation for an impeachment of the credibility of the witness. A witness may be impeached upon matters directly connected with the subject-matter of the action, but not upon collateral matters. The question before us in this instance is whether the matters upon which questions were asked on cross-examination were collateral to the subject of the action, for, if they were, then an error was committed in allowing the questions on cross-examination; if they were upon matters not collateral, then the ruling of the trial court was right. The answer of the appellant was in a single paragraph, and justified the charge made by the appellant, on the ground that the charge was true. Appellant was called as a witness, and on his direct examination testified to matters tending to establish his answer, and also testified that he did not charge the appellee with the offence of public indecency,

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nor so intend to charge. Among the questions asked him on direct examination was this: "State if at any time, and in your conversations with any persons to whom you related this transaction, you said that you had seen Cyrus Jenkins down there in this affair, if you had any intention of charging him with the commission of any crime that would subject him to a fine and imprisonment?" The answer to this was: "No; I had not." The appellant also testified that he had no malice against the appellee; and he, the appellant, further stated the name of the person to whom he first spoke of the matter, and gave the names of the persons from whom he heard of the alleged act of indecency. On cross-examination the appellee was permitted to ask the appellant whether he had not, at times and places named, made certain specified statements to persons designated in the questions, and on the ruling admitting this evidence arises the question for our decision.

The answer presented a single issue, and that issue was whether the charge embodied in the words of the appellant was or was not true, but the subject-matter of the action was the slanderous utterances. The jury had before them the whole controversy, for they could not intelligently award a compensation without considering the entire subject, which was before them by the pleadings, and borne upon in a material degree by appellant's testimony in the direct examination. In technical exactness, the issue was whether the charge was true, for the utterance of the slanderous words was admitted; so that in strictness it can not be said that the evidence was directly addressed to the issue, but although not in strictness directly addressed to the issue, it was directly and materially connected with the subject-matter of the action, and was relevant to the case; it did, in truth, constitute a most material part of the case. We are unable to perceive how a matter materially and directly connected with the subject-matter of the action, and relevant to the case, can be said to be collateral. We understand the rule to be that a distinc-

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tive collateral fact can not be inquired into for the purpose of impeaching a witness, but we also understand that where the fact is not collateral the inquiry is proper. Starkie says: "It is here to be observed, that a witness is not to be cross-examined as to any distinct collateral fact for the purpose of afterwards impeaching his testimony by contradicting him." 1 Starkie Ev. 200. At another place this author says: "The rule does not of course exclude the contradiction of the witness as to any facts immediately connected with the subject of inquiry, which in themselves would otherwise be legitimate evidence in the cause." 1 Starkie Ev. 203. Another English author says: "In accordance with this general principle, a witness may be cross-examined as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony." Taylor Ev., sec. 1300. Greenleaf says: "But it is a well-settled rule that a witness can not be cross-examined as to any fact, which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony." 1 Greenl. Ev., section 449. In *Lawrence v. Lanning*, 4 Ind. 194, Starkie's statement of the rule was adopted, and so it was in *Ware v. Ware*, 8 Greenl. 42. In *Com. v. Hunt*, 4 Gray, 421, it was said: "The rule, which excludes all evidence tending to contradict the statements of a witness as to collateral matters, does not apply to any facts immediately and properly connected with the main subject of inquiry." It is true some of the cases criticise one of the expressions of Starkie. *Attorney General v. Hitchcock*, 1 Exch. 91; *Hildeburn v. Curran*, 65 Pa. St. 59. These decisions, however, do not go to the extent of limiting the right to cross-examine, for the purpose of laying the foundation for an impeachment, to particular matters testified to by the witness on his direct examination, nor do they limit the cross-examination to such matters as bear directly and immediately upon the issue.

The effect of proving contradictory statements extends no

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further than the question of credibility. Such evidence does not tend to establish the truth of the matters embraced in the contradictory statements; it simply goes to the credibility of the witness. *Davis v. Hardy*, 76 Ind. 272; *Hicks v. Stone*, 13 Minn. 434. This consideration, in itself, supplies a strong reason for allowing a liberal latitude in cross-examining, for the purpose of laying the foundation for impeachment, for a witness who tells a falsehood concerning a matter incidentally connected with the subject of the action is as likely to testify untruly as if the falsehood had directly affected the issue. It is difficult to perceive why a material falsehood concerning a matter collaterally related to the main question is not as effective against the credibility of the witness as one immediately bearing upon the question. The courts do not put the rule, that a witness can not be impeached upon collateral matters, on the ground that the nearer the false statement is to the main issue, the stronger is its effect upon the testimony of the witness; it is put upon an entirely different ground. By one court it is put upon the ground that the time of the court is too limited to permit collateral inquiries. *Attorney General v. Hitchcock*, *supra*. An older and stronger reason is that stated in the leading case of *Spenceley v. De Willott*, 7 East, 108, and that reason is that such a practice would confuse the jury by an interminable multiplication of issues. It is quite clear that the reason on which the rule rests can have no application to such a case as this, and where the reason of the rule fails the rule itself fails. Here the questions asked on cross-examination were directly connected with the most important part of the subject-matter of the action, and they were also connected with the subject-matter of the examination in chief. There could be no confusion, because from first to last the evidence was directed to a single subject-matter. It is, indeed, very doubtful whether they would not have been legitimate even upon a cross-examination, where no impeachment was proposed. *DeHaven v. DeHaven*, 77 Ind. 236.

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It is not necessary that the impeaching testimony should be directed to a contradiction of the testimony given on the direct examination; it is competent when it contradicts statements made by the witness to questions propounded to him on cross-examination. There are cases in our own reports applying this rule, although the rule is not stated in terms. In *Dillon v. Bell*, 9 Ind. 320, the court reversed the judgment because of the refusal to allow a witness to be contradicted as to a particular matter brought out on cross-examination. In *Brown v. State*, 24 Ind. 113, the appellant was prosecuted for selling liquor to a minor, and it was held proper to ask a witness, on cross-examination, whether he had not voted for two years, and this ruling was placed on the ground that the question was proper for the purpose of impeachment. *Thompson v. State*, 15 Ind. 473, holds that it is proper to contradict the witness as to statements made on cross-examination.

The Supreme Court of New York, in *Greenfield v. People*, 13 Hun, 242, approved the rule as we have stated it, and said: "It is further objected, however, by counsel for the plaintiff in error, that in some instances the matters in respect to which evidence of contradictory statements was received, were elicited on the cross-examination of the witnesses sought to be contradicted, and not on their examination in chief. Such was the fact, but we do not understand that any rule of evidence was violated thereby, the matters as to which the witnesses were contradicted being pertinent to the issue." The statement of the rule is made by an elementary writer in these words: "It is not necessary, in order to introduce such contradictory evidence, that it should contradict statements made by the witness in his examination in chief. Ordinarily the process is to ask the witness on cross-examination whether on a former occasion he did not make a statement conflicting with that made by him on his examination in chief. But the conflict may take place as to matters originating in the cross-examination; and then, if such matters

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are material, contradiction by this process is equally permissible." Whart. Ev., section 552. Matters originating on the cross-examination must be such as are connected with the subject-matter of the action, for if they are collateral and wholly foreign to the issue, they can not be inquired into even for the purpose of impeachment, and we are not to be understood as holding that matters foreign to the subject-matter of the action, or wholly irrelevant to the issue, can be used for the purpose of impeachment, but we hold, with the authorities cited, that where the matters properly come up on cross-examination, they may be made use of for the purpose of impeachment, though the specific matter was not explicitly developed in the direct examination.

In technical strictness, the term "issue," when used with reference to pleadings, signifies the disputed point or question. Stephen Pl. 25. In a case like this, where there is a plea of justification, averring the truth of the charge, there is but a single issue, and to the issue thus joined the evidence must be relevant. By the term "relevant" we do not mean that the evidence shall be addressed with positive directness to the disputed point, but we mean evidence which, according to the common course of events, "either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other." Stephen Ev., art. 1; Best Principles of Ev. 257, n. It is not necessary that the fact offered in evidence should bear immediately and directly on the main dispute, for, to again quote from Stephen, "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction or subject-matter, are relevant to the fact with which they are so connected." Stephen Ev., art. 3. Wharton says: "Relevancy is that which conduces to the proof of a pertinent hypothesis." 1 Whart. Ev., section 20. In the case before us, the testimony of the appellant as to facts tending to establish the truth of his charge was a relevant fact, and evi-

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dence of prior statements concerning the same fact are connected with it as directly and immediately as one fact can possibly be connected with another. His statements concerning the matter which, as a witness, he declares to be true, must be relevant to the issue, even using that word in a strict technical sense. If his statements out of court are untrue, then they conduce to the proof of a pertinent hypothesis, namely, the hypothesis that the appellant's statements tending to establish his charge were not true, so that even taking the word "issue" in its strict technical sense, evidence of statements containing an account of his charge against the appellee are relevant. That the statements given out of court may tend to discredit the statements made in court tending to prove the plea of justification, is evident when it is brought to mind that if, out of court, he made one charge, and in court testified to the truth of a different one, there would be a material inconsistency in his testimony.

There must be contradiction between the statements alleged to have been made out of court and those made on the witness stand, but the degree of contradiction does not determine the competency of the impeaching testimony, however much that consideration may affect its potency. In *Tinklepaugh v. Rounds*, 24 Minn. 298, the court said: "The admissibility of the discrediting testimony does not depend on the degree of variance between it and the subsequent testimony. If it differs in any material particular it is for the jury to determine what effect such difference in statements shall have on the witness' credit." It is easy to perceive that accounts of the same transaction given to persons out of court might exert a potent influence upon testimony given to establish the truth of a statement founded upon that same transaction. If the accounts of the same transaction did not agree, then the inconsistency or contradiction would be matter for the jury to consider in determining whether the plea of justification was or was not sustained. If there were distinct

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transactions, then a different rule would apply, but there was here but a single occurrence, and, both in court and out of court, the statements of the witness were directed to that one occurrence. Judgment affirmed.

Filed Oct. 7, 1884.

No. 11,245.

VOGEL v. DEMOREST.

CONTRACT.—*Sale*.—*Rescission*.—*Fraud*.—To rescind a contract of sale of goods for fraud, the seller must be put *in statu quo* by a return of the goods.

SAME.—A written contract can not be varied by a prior or contemporaneous parol agreement.

FRAUD.—*Pleading*.—To successfully plead a fraudulent representation damage must be averred; and such representation, to be available as a cause of action or defence, must relate to an existing or past fact.

From the Bartholomew Circuit Court.

N. R. Keyes, for appellant.

J. C. Orr, for appellee.

BLACK, C.—The appellee sued the appellant, the complaint containing two paragraphs. The first paragraph was on an account for goods and merchandise sold and delivered by the plaintiff to the defendant, a bill of particulars being filed.

The second paragraph set up a written contract executed by the plaintiff and the defendant, whereby the latter was appointed an agent of the former for the sale of Mme. Demorest's patterns in Columbus, Indiana, for one year, and the defendant accepted such agency, and agreed to keep, during its continuance, an assortment of said patterns, which the plaintiff agreed to furnish at a certain discount from the retail prices; and the defendant agreed that all patterns required or sold by him during the year should be purchased of the plaintiff only. It was expressed that the appointment to said agency was made in consideration of an order to the plaintiff for patterns of the net value of three hundred dollars, and the payment of fifteen per cent. of said amount at

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the execution of the contract, and the balance cash, less five per cent. It was agreed that no terms or obligations not stipulated in the contract should be binding on either party.

It was alleged in said second paragraph that the plaintiff performed all the obligations of the contract on her part, and shipped to the defendant the goods so ordered by him, of the net value of three hundred dollars; that the defendant accepted said goods, and paid the plaintiff in cash fifteen per cent., or forty-five dollars, of said amount, but he had not paid the balance of said amount or any part thereof; that the plaintiff had been at all times ready and willing to perform her part of said contract, and to furnish said patterns, but the defendant failed and refused to comply with the contract on his part, and to keep up an assortment of said goods, and had purchased and sold, during said year, other and different patterns than those made by the plaintiff; all to her damage, etc.

The defendant answered in seven paragraphs. Demurrers to the second, third, fourth, sixth and seventh paragraphs were sustained, and the defendant having withdrawn the first and fifth paragraphs, and having refused to answer further, the court tried the cause, and found for the plaintiff, and rendered judgment accordingly.

The second paragraph of answer, directed to the second paragraph of the complaint, alleged that the goods mentioned in that paragraph of the complaint were sold by the plaintiff to the defendant, through the plaintiff's agent, who, to induce the defendant to accept said agency, falsely and fraudulently represented to the defendant that the plaintiff had no other agent at Columbus, and that the defendant should have the exclusive sale of said patterns; that, relying on said statements, and believing them to be true, and having no means by the reasonable exercise of diligence to ascertain the falsity thereof, and induced solely thereby, the defendant entered into said written contract; that after signing said contract, and when he undertook to put said goods upon the market, he ascertained that the plaintiff had another agent, named, at

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Columbus, empowered to sell, and fully authorized by the plaintiff, and engaged in selling the patterns and goods of the plaintiff, of the same kind and quality as those that the plaintiff had authorized the defendant to sell in said market; that the plaintiff had authorized and constituted said other person as her agent prior to said appointment of the defendant; that the plaintiff sent to the defendant patterns and goods under said contract, but as soon as he ascertained the existence of another agency for said patterns at Columbus, he notified the plaintiff thereof, and offered and proposed to cancel said agency, and notified the plaintiff that, by reason of the existence of another agency at Columbus, he would not retain said agency, and would not hold or attempt to sell the patterns sent to him; and that he did not sell or attempt to sell them.

The third paragraph of answer, also addressed to the second paragraph of the complaint, sought to set up, by way of defence thereto, what was alleged to be a fraudulent representation, that the plaintiff, by her agent, represented to the defendant that she already had an agent, named, at Columbus, for the sale of said patterns, and, for the fraudulent purpose of inducing the defendant to assume said agency, fraudulently represented to the defendant that if he would assume said agency the plaintiff would cancel the other agency, and constitute the defendant the sole agent at Columbus for the sale of said patterns.

The fourth paragraph set up, by way of counter-claim, that the plaintiff's agent made to the defendant a representation the same as that averred in the third paragraph, and it was alleged that the defendant had been damaged in the sum of \$500 by the failure of the plaintiff to cancel said other agency.

The sixth paragraph alleged that the defendant agreed with the plaintiff that the former would assume and accept said agency upon the terms of the contract set out in the complaint, upon the consideration that the defendant should be the sole and exclusive agent for said goods at Columbus dur-

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ing the time of his agency ; that said consideration had wholly failed, in that, during the time of the defendant's agency, the plaintiff created and appointed another person named, as the agent of the plaintiff at said place, with authority to sell, and who did sell, said patterns at said place, and thereby the defendant was deprived of the profits of an exclusive sale.

By the seventh paragraph substantially the same facts as those alleged in the sixth were pleaded as a partial failure of consideration.

All these answers were manifestly insufficient, and they may be briefly disposed of. The second paragraph does not show, or attempt to show, that the defendant was in any way injured, and to defend the action on the contract, on the ground of fraudulent representation, it was necessary to show damage to the defendant. If this paragraph was intended to show a rescission, it did not do so ; it failed to show that the defendant had placed, or offered to place, the plaintiff *in statu quo* by the return of the goods.

As to the averment in this paragraph, and all the others, that the plaintiff represented that if the defendant would enter into the contract, he should be the plaintiff's only agent at said place, it could not serve as an allegation of a fraudulent representation, it being the allegation of a promise, and not of a representation of an existing or past fact. And the allegation of such a promise or agreement in each of the paragraphs was an attempt to vary the terms of the written contract sued on by means of a prior or contemporaneous parol promise or agreement.

The judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the appellant's costs.

Filed Oct. 9, 1884.

No. 11,708.

WRIGHT v. WRIGHT ET AL.

MARRIED WOMAN.—*Judgment.*—A judgment against a married woman is valid as against collateral attack.

SAME.—*Parties.*—*Statute Repealed.*—Section 5129, R. S. 1881, which required that suits concerning the lands of a married woman should be prosecuted by or against the husband and wife jointly, is repealed as to suits in her behalf, by section 254.

SAME.—*Descent.*—*Sheriff's Sale.*—*Statute Construed.*—Section 2484, R. S. 1881, prevents the sale on execution against a married woman, during her second marriage, of lands held by her in virtue of a previous marriage, if she have children alive by such marriage.

SAME.—*Real Estate, Action to Recover.*—*Limitation of Action.*—*Decedents' Estates.*—A suit by a woman to recover lands sold on execution against her while married is barred if brought after the lapse of ten years, and after two years from the death of her husband.

From the Tipton Circuit Court.

J. M. Fippen, for appellant.

D. Waugh and *J. P. Kemp*, for appellees.

ZOLLARS, J.—Appellant brought this action to recover the possession of real estate. The overruling of a demurrer to the first paragraph of the answer is the only question presented for review here. The material portions of that answer may be epitomized as follows: Amasa P. Castor died intestate in 1864, leaving appellant as his widow, and children by her, who are still living, as his heirs at law. Previous to his death his real estate had been sold upon execution. In 1866 appellant intermarried with one Martin Wright, by whom she had no children. After this marriage she instituted a proceeding in partition against the execution-purchaser of her former husband's real estate, and such proceedings were had that one-third of the real estate was set off to her, and \$100 of the costs of that proceeding was adjudged against her. In 1868 the portion thus set off to her was sold by the sheriff upon an execution issued upon the judgment for costs. The purchaser at that sale assigned the

97	444
128	281

97	444
139	311

97	444
136	178

97	444
147	147

97	444
149	419

97	444
156	571
156	622
156	625

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sheriff's certificate to appellee Louisa Wright, and the real estate not having been redeemed, the sheriff executed a deed to her in January, 1870, and put her in possession of the real estate. From that time forth she has been in possession, claiming it as the absolute owner, and making valuable improvements thereon. Wright, the second husband, died in 1874, since which time appellant has remained unmarried. This action to recover the real estate so held by appellee was commenced in December, 1883. The contention of appellant is that the sale of her real estate by the sheriff during the life of her second husband conveyed no title to appellee Louisa Wright: *First*. Because the 18th section of the law of descent inhibited the alienation of such lands during a second or subsequent marriage; and, *Second*. Because the judgment for costs against her in the partition proceedings was void, she, at that time, being a married woman, and her husband not having been joined with her in the action. It is too late now to raise any question as to the validity of the judgment for costs. Her time to object to that was when the judgment was rendered against her. A judgment against a married woman is valid until set aside in some proper proceeding. It can not be treated as void, and overthrown in a collateral attack. *Landers v. Douglas*, 46 Ind. 522; *Burk v. Hill*, 55 Ind. 419; *Gall v. Fryberger*, 75 Ind. 98.

It is also too late for appellant to raise the question that her husband was not a party with her in the partition proceeding. She commenced and prosecuted the action without him, and was awarded the real estate in severalty. It is through that proceeding that she claims title to it. When she impeaches that proceeding, she impeaches her own title. We are cited to section 7 of the act approved on the 31st day of May, 1852, 1 R. S. 1876, p. 551, which provides that all suits relative to the separate lands of a married woman shall be prosecuted by or against the husband and wife jointly. This section is copied into the revision of 1881 as section 5129. We think that the practice act, approved on the 18th

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day of June, 1852, was in conflict with the above section, and hence, being of later date, repealed it so far as there was a conflict. That act declared, in broad terms, that when the action concerns the wife's separate property, she might sue alone without joining the husband. 2 R. S. 1876, p. 36. The wife's separate land is clearly her separate property. The practice act of 1881 contains a similar provision. R. S. 1881, section 254.

The 18th section of the statute of descents, 1 R. S. 1876, p. 411, provided that if a widow should marry a second or any subsequent time, holding real estate in virtue of any previous marriage, and there were children alive by such marriage, such widow could not, during such second or subsequent marriage, with or without the assent of her husband, alienate such real estate; and that if during such marriage such widow should die, such real estate should go to her children by the marriage in virtue of which it came to her.

This act was amended in 1879, R. S. 1881, section 2484, but the amendment does not affect this case. Under the original act, it has been held that such lands can not be sold upon execution, during a second or subsequent marriage, so as to convey to the purchaser a title that will defeat the claims of the widow or children. *Schlemmer v. Rossler*, 59 Ind. 326; *Smith v. Beard*, 73 Ind. 159; *Haskett v. Hazel*, 83 Ind. 534. See, also, upon the question of alienation, *Vinnedge v. Shaffer*, 35 Ind. 341; *Bowers v. Van Winkle*, 41 Ind. 432; *Connecticut Mutual Life Ins. Co. v. Athon*, 78 Ind. 10.

Appellees have furnished no brief, nor are we otherwise informed of the ground upon which the court below overruled the demurrer to the answer. The answer does, and seems to have been intended to, raise the question of the statute of limitations. It is probable that the demurrer to it was overruled upon the ground that the action is barred by that statute. It is provided by that statute, that actions for the recovery of real property, sold on execution, must be brought by the execution debtor, etc., within ten years after

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the sale. Persons being under legal disabilities when the cause of action accrues may bring their actions within two years after the disabilities are removed. Sections 293 and 296, R. S. 1881 ; 2 R. S. 1876, pp. 123 and 126.

Under this statute the answer is sufficient. As already stated, the real estate was sold by the sheriff in 1868. In 1870 the sheriff executed and delivered a deed to appellee Louisa Wright, and put her in possession of the property, which possession she has since held. Appellant's second husband died in March, 1874. From that time until this action was commenced in December, 1883, appellant remained unmarried. It will thus be seen that from the execution of the sheriff's deed until the institution of this action, nearly thirteen years had elapsed, during which time the grantee, under that deed, was in the possession of the property, and that for nearly ten years of that time appellant was free from any legal disability. There was, therefore, no error in overruling the demurrer to the answer. Whether the sale was voidable or void under the facts stated in the answer, appellant's action for the recovery of the property was barred by the statute. *Gray v. Stiver*, 24 Ind. 174 ; *Hatfield v. Jackson*, 50 Ind. 507 ; *Brown v. Maher*, 68 Ind. 14 ; *Second Nat'l Bank v. Corey*, 94 Ind. 457.

The judgment is affirmed, with costs.

Filed Oct. 9, 1884.

No. 11,105.

FARRAR v. CLARK ET AL.

EJECTMENT.—Evidence.—Effect of Decree Quieting Title.—Res Adjudicata.—

A decree in favor of one out of possession against one in possession, quieting the title of the former free from all claims of the latter except a lien for taxes, is proper evidence for the former against the latter in a subsequent suit for the possession, and concludes the latter not only as to the title, but as to any right of possession not afterwards acquired.

From the Miami Circuit Court.

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125	188
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132	64
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135	173
97	447
141	582
97	447
147	401
97	447
149	89
97	447
153	653
97	447
161	886
97	447
165	286

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J. Farrar, J. L. Farrar and W. C. Farrar, for appellant.

H. J. Shirk, J. Mitchell, W. E. Mowbray and C. R. Pence, for appellees.

ELLIOTT, C. J.—The questions in this case arise on the ruling denying appellant a new trial.

The trial court admitted in evidence a record of a suit for partition instituted by the appellees against the appellant, wherein the land in dispute was the same as that here in controversy; there was, therefore, an identity of parties and property. In the partition suit a counter-claim was filed by the appellant, asserting title and asking that it be quieted. The case came to this court by appeal, and in the course of the opinion it was said: "As between the appellees and appellant, the action is simply to quiet the title to the real estate, by removing a cloud from such title, and for no other purpose." *Farrar v. Clark*, 85 Ind. 449. The character that the action between these parties assumed is, therefore, definitely settled. The present action is for possession, and the appellant's contention is that the record of the former suit is not competent evidence.

Our statute provides for two classes of actions, one for the recovery of the possession of real property, and one for determining and quieting title. The action to quiet title is, as the statute reads, "for the purpose of determining and quieting the question of title," sec. 1070, R. S. 1881, and is a very comprehensive one. It combines some of the elements of the proceedings in equity known as bills of peace and bills *quia timet*, for it will lie to determine and settle the title of one in possession, and it will also lie to determine and quiet title in one out of possession. It will lie against any person claiming "title to or interest in real property," and a plaintiff may have all conflicting claims, liens and interests settled and adjusted, and his title declared and quieted. *Ragsdale v. Mitchell*, *post*, p. 458; *Green v. Glynn*, 71 Ind. 336; *Stumph v. Reger*, 92 Ind. 286. Pomeroy, in speaking of the statutory action, says:

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“The very object of the proceeding assumes that there are other claimants adverse to the plaintiff, setting up titles and interests in the land or other subject-matter hostile to his. Of course all these adverse claimants are proper parties defendant, and if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants.” Pomeroy Rem., section 369.

The author well expresses the object of the action when he says that it accomplishes its full effect only by “putting all litigation to rest,” for the great purpose of the action is to secure repose. Our own cases have steadily maintained the doctrine that the action is intended to settle in one proceeding all claims and to put an end to all litigation concerning the title. *Green v. Glynn*, *supra*; *Hays v. Carr*, 83 Ind. 275; *Ulrich v. Drischell*, 88 Ind. 354, see p. 360; *Cooter v. Baston*, 89 Ind. 185, *vide auth.*, p. 186; *Stumph v. Reger*, *supra*; *Ragsdale v. Mitchell*, *supra*. It seems clear that as the action to quiet title directly and fully presented for investigation the titles of the respective parties to the land in controversy, the record must be evidence in such a case as this, for possession depends in an essential degree upon the question of ownership, and ownership is established by evidence of title. The record furnished evidence of title in the appellees as well as want of title in the appellant, and was unquestionably competent.

The question as to the effect of a judgment in an action to quiet title is important but not difficult. If, as has been so often held, the purpose of the action is to determine and quiet title, then it is manifest that the judgment determining and quieting title must be conclusive. The decree quieting title in the appellees was not a mere empty declaration; it was a conclusive adjudication. Title will not be quieted unless the decree can operate, and if it does operate, then it puts at rest the question of title. In a case similar to the present the court said: “Of what avail, then, can it be to

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the plaintiff to have his title quieted in him, when, after that is done, he can not recover possession upon it? Equity will not grant a relief in form which must be valueless in fact." *Dumont v. Dufore*, 27 Ind. 263. Freeman says: "A final decree in chancery is as conclusive as a judgment at law. Such decrees are available as estoppels, whether the second action involving the same question be at law or in equity." Freeman Judg., section 248. The object of the action to quiet title was to settle all claims, and the question of title was the dominating one in that action and the controlling one in this. It is a mistake to suppose that the object of a suit to quiet title is to settle particular claims; on the contrary, it is, as was in substance said in *Barton v. McWhinney*, 85 Ind. 481, an action to quiet the plaintiff's title against all claims of the defendant, whatever they may be. If, then, all claims are included, all claims are necessarily finally adjudicated, and the question of title forever settled. The question of title having been adjudicated, that adjudication is final, and concludes the parties as to titles held at the time, but it does not operate upon after acquired titles. *Reed v. Calderwood*, 32 Cal. 109. The case falls within the rule laid down in *Fischli v. Fischli*, 1 Blackf. 360 (12 Am. Dec. 251), and enforced by a long line of succeeding cases, that, where a matter is finally adjudicated by a court of competent jurisdiction, it is set at rest forever. *State, ex rel., v. Krug*, 94 Ind. 366; *Ulrich v. Drischell*, *supra*; *Green v. Glynn*, *supra*; *Stumph v. Reger*, *supra*.

The rule obtains where the subject-matter of the controversy is adjudicated, although the action may be upon a part only of the claims arising out of one and the same subject-matter. *Felton v. Smith*, 88 Ind. 149; S. C., 45 Am. R. 454; *Cleveland v. Creviston*, 93 Ind. 31 (47 Am. R. 367).

We can not enquire whether there was or was not error in the former action; our inquiry ends with ascertaining that there is a final judgment determining the matters in controversy. *State, ex rel., v. Krug*, *supra*; *Pressler v. Turner*, 57 Ind. 56;

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Hanna v. Scott, 84 Ind. 71; *Fritz v. State*, 40 Ind. 18; *State v. George*, 53 Ind. 434. In holding, as we do, that a judgment in an action to quiet title settles and determines all claims of title, whatsoever they may be, we reach the end of our inquiry, because we have ascertained that there is a final adjudication. The adjudication is final for the reason that it operates upon the very title under which the appellant founds his right to possession. If he had, as that decree declared, no such claim or title, and the appellees did have title free from all claims except the lien for taxes, then the right to possession can not, by any possibility, be in him. We are not inquiring what might have been done in the suit to quiet title, nor are we inquiring what might have been embodied in the decree, nor are we inquiring what character might have been given it by saving clauses, special findings, or the like; we are dealing with the proceedings and decree in that suit as they actually exist. As the decree exists, it effectually concludes him from asserting title or claim of title to the land, and without claim or title he can have no possessory right. If he has no claim he has no case; he is restricted to the lien given him by the decree in the former suit.

Judgment affirmed.

Filed Oct. 8, 1884.

No. 11,577.

BROKAW v. THE CITY OF TERRE HAUTE.

CITY.—*Widening Streets.—Right to Dismiss Proceedings.*—The statute, R. S. 1881, section 3180, authorizes a city, on payment of costs, to dismiss proceedings to widen a street, after verdict on appeal, though the city may have taken possession of the real estate sought to be appropriated.

From the Superior Court of Vigo County.

J. T. Scott, for appellant.

H. C. Pugh and *G. E. Pugh*, for appellee.

COLERICK, C.—This was a proceeding by the appellee to

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162	682
162	683
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Brokaw v. The City of Terre Haute.

open and widen Moffatt street in the city of Terre Haute, Indiana. The city commissioners, by virtue of the statute under which they acted, R. S. 1881, section 3166, etc., found and determined that certain real estate of the appellant would be damaged by the widening and opening of the street in the sum of \$2,400, and that the benefits which it would derive therefrom would amount to a like sum, and made their report to that effect to the common council, who approved the same, and thereupon the appellant, being affected by the proceedings, appealed therefrom to the superior court of Vigo county, where the same was tried by a jury, who returned a verdict in favor of the appellant, assessing his damages at \$1,500. After the rendition of the verdict, and before any action had been taken thereon, the appellee, having paid all the costs, moved the court "for leave to dismiss and discontinue the proceedings to open the street in controversy," which motion was resisted by the appellant, who, in support of his opposition thereto, presented and filed his affidavit, which is made a part of the record in this case, in which it was stated that after the street had been ordered by the common council to be opened, and after the appellant had taken and perfected his appeal, and while the same was pending, the appellee elected to open the street, and, accordingly, caused a precept to be issued to the city marshal, directing him to open the same, and that said marshal, armed with said precept as his authority therefor, proceeded to open it, and threatened to tear down, for that purpose, the fences of the appellant, who, to avoid the exposure to which his property would have been thereby subjected, obtained permission of the marshal to remove his fences a distance of thirty feet, so as to leave the street open as required by the appellee, and that he was compelled to do so in order to save the balance of his property from irreparable damage; and that the removal of the fences had cost him \$45; and that the grass and trees growing on the place so opened for the street had been irreparably injured by being exposed to the street, etc. The motion to

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discontinue the proceedings was sustained by the court, to which ruling the appellant excepted, and it constitutes the only error assigned.

The sole question presented for our consideration is, was the appellee precluded from discontinuing the proceedings by its act of opening the street in controversy before the final determination of the appeal? The statute, which authorized the appeal, provides, "but such appeals shall not prevent such city from proceeding with the proposed appropriation, nor from making the proposed change or improvement." R. S. 1881, section 3180. It, also, further provides, "If upon appeal, the report of the commissioners as to the benefits or damages be greatly diminished or increased, the city may, upon payment of all costs, discontinue such proceedings."

Although the appellee, in the exercise of the power granted to it by the first provision of the statute above cited, widened and opened the street during the pendency of the appeal, it was not, in our opinion, precluded thereby from subsequently abandoning the same, and discontinuing the proceedings which were still pending, upon ascertaining that the amount of the damages awarded to the appellant, on his appeal, greatly exceeded the sum that was assessed in his favor by the city commissioners. The results that legally flowed from the action of the appellee in discontinuing the proceedings were the abandonment by the appellee of the real estate of the appellant which had been condemned for the street, and the restoration to him of its possession, and rendering the appellee liable, in an action brought for that purpose, for any damages that the appellant may have sustained which were the direct and proximate result of the proceedings and the acts of the appellee under them.

The views above expressed are fully sustained by the authorities. In Dillon on Municipal Corporations, vol. 2 (3d ed.), section 609, it is said: "Where proceedings are rightfully discontinued the land-owner can not have a mandamus to collect, nor recover by action, the sum that may

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have been estimated by the commissioners; yet he may have a special action for damages for any wrongful and injurious acts of the corporation in the course of the proceedings. And it has been even held that if the municipality deems it best to abandon the proposed work or project, it may do so, and discontinue proceedings, *although it may have taken possession of the premises*. By taking possession, it is argued, the corporation does not impliedly agree to purchase at the appraisement. It may, nevertheless, discontinue the proceedings, and the land-owner can only demand the premises, and damages for being deprived of them and for injuries thereto."

In *Mayor, etc., v. Musgrave*, 48 Md. 272, it was held that "A municipal corporation has the right to abandon any contemplated improvement and repeal at its pleasure any ordinance providing for the same, and after such abandonment property-owners can not compel the corporation to take and pay for property condemned for such purpose; nor does any action lie against the corporation for such abandonment merely. But where the owner of property has suffered loss or damage by the acts or delay of the corporation in any such case, he is entitled to redress for the same." See, to the same effect, *Graff v. Mayor, etc.*, 10 Md. 544; *State v. Graves*, 19 Md. 351; *Norris v. Mayor, etc.*, 44 Md. 598; *Baltimore, etc., R. R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Garrison v. City of New York*, 21 Wall. 196.

In *Van Valkenburgh v. City of Milwaukee*, 43 Wis. 574, the court said: "Such abandonment also operated to restore to the plaintiff all the interest in the lots sought to be condemned, which he had when the condemnation proceedings were instituted; and, had he suffered no damage by reason of the proceedings or the acts of the city under them, he would have no just cause for complaint. But, having sustained damage thereby, it is very manifest that the city ought to compensate him therefor; and the statute does not assume to deprive him of the right of action to recover them. Hence, we think this action may be maintained to recover such damages

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to him as were the direct and proximate result of the condemnation proceedings and the acts of the city under them.”

In *Feiten v. City of Milwaukee*, 47 Wis. 494, it was held that where proceedings by a corporation to condemn land for a public use have been lawfully abandoned, the owner can recover only damages resulting to him from wrongful acts done by the corporation in the course of such proceedings. The court said: “In *Van Valkenburgh v. Milwaukee*, 43 Wis. 574, the city had condemned the plaintiff’s land for the purposes of a public park, had taken possession thereof, and had done various acts thereon injurious to the freehold. Afterwards the Legislature authorized the city to abandon the condemnation proceedings, and it abandoned them. It was held that the plaintiff could recover damages for such injuries, and for the loss of possession. When the city abandoned those proceedings and restored the land it had actually taken, to the owner, the plainest principles of justice required that it should compensate him for the injuries which it had done to his possession and freehold.”

No error was committed by the court below in sustaining the motion to discontinue the proceedings.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Oct. 9, 1884.

No. 11,654.

**HARDER v. THE BOARD OF COMMISSIONERS OF MARION
COUNTY.**

CONTRACT.—*Damages.*—If a contract for work and labor contains a stipulation giving the employer the right to revoke the contract when not satisfied with the work, the contractor has no remedy for damages resulting from the exercise of the right thus reserved.

From the Marion Circuit Court.

W. D. Bynum and *A. T. Beck*, for appellant.

W. W. Woollen, for appellee.

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BICKNELL, C. C.—The appellant filed a claim against the appellees for \$600, as the profits which would have accrued to him on a contract with them for work to be done on the court-house, which contract, as he alleged, the appellees had wrongfully prevented him from completing.

It appeared that the appellant was paid for all the work he did up to the 16th of December, 1882, and that then the appellees made an order revoking and cancelling the contract. They also allowed him \$661.90, "balance in full of all demands against Marion county for repairing and painting in the court-house per contract," and gave him a county order "for balance in full for repairing, painting, etc., per contract," and took his receipt therefor; but he claimed afterwards that he ought to have been permitted to do more of certain work called "marbleizing," and brought this suit.

The appellant's written proposal to work for the appellees was as follows:

"I propose to do the repairing of the county court-house of Marion county as follows: The fresco-work for fifty-five cents the square yard, and repairing the walls with 'marbleizing' at \$3.50 per day, * * * * * all the work to be done in a good workmanlike manner, * * * * * the commissioners to furnish the material."

This proposition was accepted with a modification as follows:

"And the board, being sufficiently advised, accepts the foregoing proposition on the terms stated. The board reserves the right to revoke and set aside the contract when not satisfied with the work being done, said work not to be commenced till the plastering is dry."

This reservation meant something; without any such stipulation the county board would have had a right to stop the work, if it was not properly done, or if the appellant proved to be incompetent. The object of the stipulation was to give the county board rights, which, without the stipulation, it would not have had, and the appellant, after agreeing to the stipulation, can not justly complain of its enforcement.

Harder v. The Board of Commissioners of Marion County.

There is no question about the fresco-work, but the appellant claims substantially that he ought to have been permitted to do more repairs in the way of "marbleizing" than the county board wanted done. It will be observed that there is no specification in the contract as to the extent of the repairing. All that is mentioned is repairing the county court-house with "fresco-work" and "marbleizing." It is not stated how much of either is to be done, nor in what places any of it is to be done, except that none of it is to be commenced "till the plastering is dry."

In such a contract it is for the employer to say how much repairing he wants, and a workman who, under such a contract, insists on placing repairs where he thinks fit, without regard to the directions of his employer, ought to be discharged. It seems that under the present contract the appellees had a right to stop the work when all that they desired was done, and certainly if the appellant went on repairing contrary to the directions of the appellees, involving them in expenses where they wanted no repairs, the putting a stop to further work could not be complained of if the appellant were fully paid for all he had actually done.

Here the appellant was fully paid for all he did, and there was evidence that the appellees were not satisfied with the manner in which the work was going on; that they had complained to the appellant about "spreading out" and doing work they did not want done, and were talking about discharging him, yet he continued "to spread out" and do work not wanted by the commissioners, nor contemplated in the contract.

We think that under the facts as shown by the evidence the appellant had no right to recover. His claim was disallowed by the county board.

On an appeal to the circuit court, the finding was against him, and over a motion for a new trial judgment was rendered in favor of the county commissioners; from that judgment this appeal was taken. The overruling of the motion for a new trial is the only error assigned.

Ragsdale et al. v. Mitchell.

The reasons for a new trial are :

1. That the finding is contrary to the evidence.
2. That the finding is contrary to law.
3. That the finding is not sustained by sufficient evidence.
- 4, 5, 6 and 7. That the court erred in the admission and exclusion of testimony.

We have carefully considered the testimony and are satisfied that under the proper construction of the contract between these parties, there was no error either in the admission or exclusion of testimony, and that the finding was not contrary to law and was sustained by the evidence.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Oct. 9, 1884.

No. 11,581.

RAGSDALE ET AL. v. MITCHELL.

QUIETING TITLE.—*Complaint.*—A complaint to quiet title which states the specific facts upon which plaintiff's title rests, and thereby discloses that the defendant has an interest, is bad on demurrer, though it be also alleged generally that the plaintiff "holds the land in law and equity discharged of and free from all claims and liens of" the defendant.

SAME.—*Statement of Title.*—Where a pleader specifically describes the title upon which the right to recover is based, he must recover on the title described, and the specific description of title can not be controlled by a conclusion of law.

SAME.—*Bankruptcy.*—*Wife's Interest.*—*Judicial Sale.*—A complaint against the wife of a bankrupt to quiet title, which shows a sale of lands of the bankrupt to the plaintiff by order of the bankruptcy court to satisfy liens thereon, the wife not being a party to the order of sale, shows that the wife has an interest in the lands, and is, therefore, bad.

From the Lawrence Circuit Court.

G. W. Friedley, E. D. Pearson and S. D. Lockett, for appellants.

M. F. Dunn and G. G. Dunn, for appellee.

97	458
125	188
97	458
122	64
97	458
135	173
97	458
140	412
142	223
143	70
97	458
147	156
97	458
149	436
152	62
97	458
153	653
97	458
163	124
97	458
165	287

Ragsdale et al. v. Mitchell.

ELLIOTT, C. J.—The appellee's complaint alleges that he purchased at public sale certain lands; that the sale was made by Davis Harrison, assignee of William Ragsdale, bankrupt; that under the order of the United States Circuit Court the money was to be applied, first, upon the debt of the Northwestern Mutual Insurance Company as a prior lien; and, secondly, upon the debt of the appellee, whose claim had been declared a preferred lien, on the ground that it was for the purchase-money of the land; that the amount of the preferred liens named was \$16,000, and that the land sold for \$12,000, leaving unpaid a part of the appellee's debt. It is further alleged that the "plaintiff now holds the land in law and equity discharged of and free from all claims and liens of said Ragsdale and wife," and that the wife claims an inchoate interest in the land.

The title of the appellee is specifically described, and as he can only recover according to the allegations of his pleading, he must recover upon the title pleaded. It may not be necessary to specifically describe a title, but when the pleader does describe one title, and does describe it specifically as the only title upon which he relies, his recovery must be had upon his title as laid. Stephen Pl. 304; Sedg. & Wait Trial of Title, section 343. According to the statements of the complaint, the title which the plaintiff purchased was such, and such only, as the sale and conveyance by the assignee could transfer, and if this title is sufficient to cut off the rights of the wife, then the complaint is good, otherwise it is not; for as this is the title specifically described and exclusively relied on, the recovery must be had upon that or not at all.

A conclusion of law thrown into a complaint can not control the specific statements of facts; nor can a conclusion from facts stated in general terms control; on the contrary, the specific statement rules the pleading. *Reynolds v. Cope-land*, 71 Ind. 422; *Richardson v. Snider*, 72 Ind. 425 (37 Am. R. 168); *State v. Wenzel*, 77 Ind. 428, *vide* authorities, p. 430;

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McMahan v. Newcomer, 82 Ind. 565; *Keepfer v. Force*, 86 Ind. 81; *Petty v. Trustees, etc.*, 95 Ind. 278.

The statement that the appellee holds "the land in law and equity discharged of and free from all claims and liens of said Ragsdale and wife," is a mere general conclusion of law, and does not exert a controlling influence upon the pleading. *Mescall v. Tully*, 91 Ind. 96; *Platter v. City of Seymour*, 86 Ind. 323; *Boyd v. Olvey*, 82 Ind. 294; *Kimble v. Christie*, 55 Ind. 140.

The facts pleaded do not show that the appellee has a right to hold the land free from all claims of the appellants. The rights of Mrs. Ragsdale were not divested by the sale made by the assignee of her husband; on the contrary, that sale vested in her the right in the land cast upon her by the statute as the wife of the bankrupt. *Roberts v. Shroyer*, 68 Ind. 64; *Jackman v. Nowling*, 69 Ind. 188; *Ketchum v. Schickeltanz*, 73 Ind. 137; *McCracken v. Kuhn*, 73 Ind. 149; *Haggerty v. Byrne*, 75 Ind. 499; *Leary v. Shaffer*, 79 Ind. 567, *vide* p. 570; *Keck v. Noble*, 86 Ind. 1; *Mattill v. Baas*, 89 Ind. 220. The appellee could not and did not acquire a title superior to that of Mrs. Ragsdale by the sale made by the assignee, and, therefore, can not divest her of all right and interest by force of the title derived from that source. All that the conveyance of the assignee transferred was the title of the husband; it did not carry that of the wife.

The judgment of the United States Court, ordering the sale of the property and directing how the proceeds should be distributed, did not destroy the rights of Mrs. Ragsdale, for the very plain reason that she was not a party to the proceeding. We suppose it to be perfectly clear that the rights of a wife are not affected by a judgment rendered in a suit to which she was not a party.

We have shown that the sale made by the assignee of the husband did not divest her title, and have also shown that her rights were not impaired by the judgment of the Federal Court; she has, therefore, still some title to the land. As she

has, as appears from the facts pleaded, title to the estate she claimed, it is difficult to perceive any ground upon which the action can be maintained. It is not necessary to decide what her title or interest is; it is enough to defeat such an action as this to show that she has some title. It can not be possible that title can be quieted upon a complaint showing on its face that the defendants have an interest in the land, since this would be to vest all title in the plaintiff, although it appears that the defendant has also some interest in the land which he has a right to have preserved and protected.

The action to quiet title provided by the statute is an extension of the equity doctrine, which settled titles under a proceeding called a bill of peace. *Curtis v. Suteer*, 15 Cal. 259; *Green v. Glynn*, 71 Ind. 336. Under the equity rule, a bill of peace would lie only where the complainant was in possession; but under the statute an action may be maintained by an owner whether in or out of possession. The object of the action given by the statute is substantially the same as that of a bill of peace, namely, to settle the title of the plaintiff and clear it from all claims of the defendant. It is obvious that the purpose of the statute is to enable the parties to settle, in one comprehensive action, all conflicting claims, and thus secure repose, but it is equally plain that a defendant, who has a just claim, can not be deprived of it. *Porter v. Mitchell*, 82 Ind. 214. From the facts stated in the complaint, this appears to be the end sought to be attained by the appellee, for he shows a rightful title in the defendants, and yet asks that it may be destroyed. It is very clear that no principle of law or equity can be found which will sustain the appellee's complaint.

It may be that Mrs. Ragsdale has only a mere equity of redemption as against the vendor's lien and the mortgage which she executed. *Vermillion v. Nelson*, 87 Ind. 194; *Kissel v. Eaton*, 64 Ind. 248. But even if she has no greater right than this, she is still entitled to have it preserved; it can not be cut off by an action to quiet title. An action to

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quiet title does not merely settle title so far as to invest the plaintiff with possession. It does much more than this when successfully prosecuted; it sweeps away all claims and liens which impair the complainant's title. If Mrs. Ragsdale has any estate whatever in the land, it can not be swept away from her.

The question presented by the complaint is, not whether an action to compel the appellants to redeem can be maintained, but whether the facts pleaded are such as entitle the appellee to a decree divesting her of all her rights, for this would be the effect of a decree in such a case as this. The effect of a decree in an action to quiet title is to free the land from all claims of the defendant, and it is a conclusive adjudication upon all conflicting claims to the land. *Green v. Glynn, supra*; *Hays v. Carr*, 83 Ind. 275; *Ulrich v. Drischell*, 88 Ind. 354, *vide* p. 360; *Cooter v. Barton*, 89 Ind. 185, *vide* auth. p. 186; *Stumph v. Reger*, 92 Ind. 286. The facts stated in the complaint show that the appellee is not entitled to such a decree, for they show that Mrs. Ragsdale has a claim which he has no right to take from her.

If it appeared that the vendor's lien or the mortgage had been foreclosed against the appellants, then a very different question would be presented, but this does not appear. The case made comes to this: The complaint states facts showing a just claim of the wife subject to a vendor's lien and a mortgage, and, showing this, yet asks the court to deprive her of that claim by quieting title in the appellee. The action is not to mark out and define the rights of the defendants, but to cut them out of all interest in the land. The question is, not whether the appellee might have a decree in a proper case defining the extent of his estate and marking out that of the appellants, but the question is whether his complaint states facts showing a right to a decree quieting title.

Judgment reversed with instructions to sustain the demurrer to the complaint.

Filed Oct. 8, 1884.

Deputy *et al.* v. Mooney.

No. 11,608.

DEPUTY ET AL. v. MOONEY.

REAL ESTATE, ACTION TO RECOVER.—*Title and Right in Plaintiff.*—In an action for the recovery of possession of real estate, if the plaintiff fail to show title and right of possession in himself, he can not recover, even though the defendant has no title.

PARTITION.—*Payment of Purchase-Money.—Equitable Title.—Deed.*—Under section 1202, R. S. 1881, a purchaser is not entitled to a deed of conveyance until the purchase-money is paid; he merely acquires by his purchase an equitable title to the land, without any right of possession.

From the Jackson Circuit Court.

W. K. Marshall and *R. M. Patrick*, for appellants.

B. H. Burrill and *F. Emerson*, for appellee.

COLERICK, C.—This action was brought by the appellee against the appellants, to recover the possession of certain real estate, situate in Jackson county, Indiana. An answer of general denial was filed to the complaint, which was in the ordinary form prescribed by the statute in such cases. The issues were tried by the court, and resulted, over a motion for a new trial, in the rendition of a judgment in favor of the appellee, for the possession of said real estate, and damages for its detention.

The only error assigned is the overruling of the motion for a new trial. Among the causes assigned in support of the motion were, that the verdict was not sustained by sufficient evidence, and that it was contrary to law.

The facts in this case, as shown by the uncontroverted evidence adduced at the trial, which is in the record, are as follows: One William W. Roseberry died seized of the real estate in controversy. Afterwards, in an action for its partition, wherein his heirs were the parties, it was found that said real estate was indivisible, and, for that reason, it was ordered by the court to be sold by a commissioner appointed for that purpose, who, on the 30th day of June, 1882, pursuant to said order, sold the same for \$900 to the appellee, who, on said day, paid to the commissioner one-third of the amount of said purchase-money, and for the residue executed

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138	426
97	463
138	298
97	463
145	45

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to him her two notes for \$300 each, payable, respectively, in nine and eighteen months thereafter, and thereupon he executed to her a certificate of purchase for said real estate, and reported the sale to the court, and it was, on the 13th day of September, 1882, confirmed by the court, but it does not appear by the evidence that a deed of conveyance for the property was ever executed to the appellee, or that any order was made by the court authorizing or directing its execution, or that the purchase-money had been fully paid. This action was commenced before the last instalment of the purchase-money became due. On the trial the appellee introduced in evidence, for the purpose of establishing her title to said real estate and her right of possession thereto, said certificate of purchase, and we infer, from a careful examination of the record, that the court below held that it was sufficient for that purpose, and hence rendered the judgment from which this appeal was taken.

In actions like this to recover the possession of real estate, if the plaintiff fails to show title *and right of possession* in himself, he can not recover, even though the defendant has no title. *Mull v. Orme*, 67 Ind. 95. Was the appellee in this case entitled to the possession of the real estate in controversy by virtue of said certificate of purchase? The statute under which the purchase was made provides: "Whenever it shall appear to the court that the purchase-money for the land sold has been duly paid, the court shall order such commissioner or some other person to execute conveyances to the purchasers, which shall bar all claims of such owners to said lands as effectually as if they themselves had executed the same." R. S. 1881, section 1202. Under this statute a purchaser is not entitled to a deed of conveyance until the purchase-money is paid. *Swain v. Morberly*, 17 Ind. 99; *Swindell v. Richey*, 41 Ind. 281. He merely acquires by his purchase an equitable title to the land, without any right to its possession until the legal title, by commissioner's deed, becomes vested in him. *Stout v. McPheeters*, 84 Ind. 585.

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The authority last cited is decisive of this case, as the facts and question of law involved in that case were similar to those in this case. It was there said by this court: "It follows that, upon the facts found, the appellee had but a mere equitable title to the land in controversy; that he had not the legal title to it, nor the legal right to its possession. Until the title, by commissioner's deed, becomes vested in the purchaser, it remains in the original owners. Neither the sale nor its confirmation by the court passes the title to the purchaser. The sale is not perfected until the confirmation and the delivery of the deed." In *Rorer on Judicial Sales*, section 106, it is said: "Such is the rule, whether the sale be made by a master, commissioner, or other person or functionary authorized by the court to conduct the sale. The bargain is not ordinarily considered as complete until the sale is confirmed and the conveyance is made." It has been often decided by this court that when land is sold by title bond, or contract, the vendee is not entitled to its possession, in the absence of an agreement to that effect, and if he takes possession, the vendor may recover the same at any time, although the vendee is not in default in paying the instalments of the purchase-money. *Wright v. Blachley*, 3 Ind. 101; *Holmes v. Schofield*, 4 Blackf. 171 (29 Am. Dec. 364); *Doe v. Brown*, 7 Blackf. 142 (41 Am. Dec. 217); *Kratemayer v. Brink*, 17 Ind. 509; *Griffin v. Rochester*, 96 Ind. 545.

As the evidence in this case failed to show that the appellee was entitled to the possession of the property in dispute, the court clearly erred in overruling the motion for a new trial, and, for the error so committed, the judgment ought to be reversed.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellee, and the cause remanded with instructions to the court to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Filed Oct. 11, 1884.

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 Lowry v. Smith.

No. 11,686.

LOWRY v. SMITH.

97	466
126	317
97	466
145	340
97	466
160	8

MORTGAGE.—Sale Subject to Part of Debt.—Error in Record.—Liability of Recorder.—Vendor's Lien.—Subrogation.—A. mortgaged land to B., and the mortgage duly recorded. A. subsequently sold the land to C., who, as part of the purchase-money, agreed to pay \$500 of the mortgage debt to B., the agreement being recited in the deed to C., but the record of the deed only stating the amount assumed as \$200, and the property was conveyed by C. to D., and C. afterwards died insolvent, leaving A. to pay the mortgage debt.

Held, that the recorder and the sureties on his official bond were liable to A. for his failure to record the deed properly.

Held, also, that A. could enforce a vendor's lien against D. for \$200 and interest.

Held, also, that A. was subrogated to the rights of B., and could have enforced the lien in his right. In equity D. was the principal and A. the surety, and A., having paid the debt, became entitled to the security held by the creditor.

From the Madison Circuit Court.

M. A. Chipman and J. W. Sansberry, for appellant.

M. L. Robinson and J. W. Lovett, for appellee.

BICKNELL, C. C.—The complaint of the appellant was in two paragraphs. He sought in the first paragraph to enforce a vendor's lien against the appellee. In the second paragraph he claimed to be subrogated to the rights of a mortgagee, he having been compelled to pay \$500 of the mortgage debt, which a grantor of the appellee, for a valuable consideration, had assumed to pay, and which the appellee, as a purchaser with notice, was bound to pay.

Demurrers to these paragraphs for want of facts sufficient were sustained and judgment was rendered against the appellant. The rulings upon said demurrers are the errors assigned.

The facts stated in the complaint are, in substance, as follows: The appellant owned land and mortgaged it to one Brunt, the mortgage was duly recorded, afterwards the ap-

Lowry v. Smith.

pellant sold the land to Nathan Lowry, who, as part of the purchase-money, agreed to pay \$500 of the mortgage debt to Brunt. This assumption of the \$500 was recited in the deed from James Lowry to Nathan Lowry, and this deed was duly recorded, but the recorder, in his record, inserted by mistake \$200 instead of \$500, as the amount of the mortgage debt assumed by Nathan Lowry. Nathan never paid any part of it, died insolvent and left no property, the appellant was compelled to pay Brunt, the mortgagee, the \$500 and interest. The appellee was a subsequent purchaser of the mortgaged land, claiming under Nathan Lowry.

These facts were under the consideration of this court in the case of *State, ex rel., v. Davis*, 96 Ind. 539. That was a suit by the present appellant against the recorder and his sureties on his official bond, claiming damages for the negligence of the recorder in failing to record the deed properly; it was held in that suit that the present appellant could recover such damages from the recorder and his sureties. In that case, HOWK, C. J., delivering the opinion of the court, said:

“It is well settled that the purchaser of real estate is presumed to have examined the records of the deeds, necessary to make out his chain of title, and under which he claims, and is bound by the recitals in such deeds showing encumbrances, or the non-payment of purchase-money. He is charged with constructive notice of facts recited in a deed under which he claims, and is bound by such facts, even though he have no actual notice thereof. * * * But in *Gilchrist v. Gough*, 63 Ind. 576, it was held by this court, and correctly so, we think, that the record of any instrument entitled to be recorded is only notice, whether actual or constructive, of the existence and record of such instrument, and of the contents, *not* of the instrument itself, but *only* of such record. * * * So here, by the mistake of the appellee Davis, as such recorder, the land conveyed by the relator was bound, in the hands of a subsequent purchaser thereof, in good faith and for a valu-

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able consideration, as security for the payment of only \$200, the sum expressed in the record of the relator's deed, instead of \$500, the sum expressed in the deed itself, and the interest."

It follows from this decision that the first paragraph of the present complaint contains a good cause of action for the enforcement of a vendor's lien against the appellee to the extent of \$200 and interest. *Sample v. Cochran*, 84 Ind. 594. And it follows, also, that as to the amount, of which the appellee had constructive notice as aforesaid, and thereby became liable to pay, the appellant is entitled to be subrogated to the rights of Brunt, the mortgagee. He has paid Brunt \$200 and interest, which the appellee was bound to pay; as to that much of the debt in equity the appellee was the principal and the appellant was the surety, and the appellant having paid it, he became entitled in equity to the security held by the creditor. *Josselyn v. Edwards*, 57 Ind. 212; *Jones v. Tincher*, 15 Ind. 308. Although payment in such a case extinguishes the remedy, or may discharge the security as respects the creditor, it has not that effect between the principal and the surety. *Gerber v. Sharp*, 72 Ind. 553; *Davis v. Hardy*, 76 Ind. 272; *Colman v. Watson*, 54 Ind. 65; *Jones Mort.*, section 878.

Each paragraph of the complaint contained a good cause of action as to said sum of \$200 and interest. The court erred in sustaining the demurrers, and, therefore, the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to overrule the said demurrers.

Filed Oct. 11, 1884.

The State, *ex rel.* Robinson, v. Hanna *et al.*

No. 11,051.

THE STATE, EX REL. ROBINSON, v. HANNA ET AL.

HIGHWAY.—Gravel Roads.—Overflow by Construction of.—Officers.—Presumption.—Jurisdiction.—County Commissioners.—Injunction.—Mandate.—Damages.—Appeal.—A complaint by the owner of real estate, along one side of which a stream of water has flowed from a time immemorial crossing a public highway, and kept from overflowing the land by a natural ridge, showed that by proceedings under the law providing for the construction of free gravel roads, the highway had been appropriated to that purpose; that work was done in constructing the gravel road, under the authority of the board of commissioners, and that the superintendent of roads, under such authority, constructed it in such a manner as to cut the natural ridge and throw the stream upon the lands, to its injury, and prayed in one paragraph for a mandate and in another for an injunction.

Held, that a case was not shown for the granting of either writ.

Held, also, that it will be presumed that the public officers did their duty, no averment of facts to the contrary being made, and the complaint stating that they assumed to act under legal authority, the county board having jurisdiction in such proceedings.

Held, also, that as section 5091, R. S. 1881, provides for assessment of damages in such cases, it must be presumed damages were awarded.

Held, also, that if the proceedings had been erroneous, the remedy was by appeal.

From the Carroll Circuit Court.

L. D. Boyd, N. J. Howe, R. P. Davidson and J. C. Davidson, for appellant.

— *Nelson and J. C. Odell*, for appellee.

ELLIOTT, C. J.—The complaint of the relator alleges that he is the owner of a tract of land; that on the west side of it was a public highway, which had been in existence for more than thirty years; that immediately south of the relator's land there was a stream of water, which had for a time immemorial crossed the highway about forty rods south of the land; that a natural ridge kept the waters off the land; that by proceedings under the law providing for the construction of free gravel roads, the highway was appropriated to that purpose; that work was done in constructing the

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gravel road under the authority of the board of commissioners; and the superintendent of roads, in building the gravel road under the order of the commissioners, constructed it in such a manner as to cut the natural ridge along the relator's land and throw the water upon it, thereby causing injury to it and to his crops. The prayer of the first paragraph of complaint is for a writ of mandate, and that of the second is for an injunction, although the facts pleaded are substantially the same.

The complaint does not make a case for a mandate or for an injunction. There is no allegation in the complaint that the appellees did not proceed according to law, and in such a case as this it will be presumed that public officers did their duty, for the complaint shows that they assumed to act under the authority of legal proceedings. There is nothing in the complaint attacking the validity of the proceedings in the matter of establishing the free gravel road, and it must be presumed that they were valid, so that we have the case of officers acting under valid legal proceedings. If it appeared that there was no jurisdiction in the board of commissioners, we should have a very different case from that presented, but the matter is one in which the board did have jurisdiction. Ample provisions are made for such cases as this, and in the absence of a contrary showing, we must presume that proper proceedings were had. R. S. 1881, sec. 5091. The statute to which we have referred provides for the assessment of damages to adjacent land-owners, and affords them an opportunity to present their claims, and until the order of the board is impeached we must sustain it, and uphold the acts of officers who proceed in accordance with it, and we must also presume that all damages suffered by the appellant were awarded him.

There is not even a charge that the proceedings were irregular or erroneous; for aught that appears full damages were duly assessed in favor of the relator. If, however, the proceedings had been erroneous, the relator's remedy would

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have been by appeal, and not by resort to the extraordinary remedy of mandamus or injunction.

There are other reasons why the complaint is bad, but we deem it unnecessary to discuss them. Judgment affirmed.

Filed Oct. 11, 1884.

No. 11,892.

LUCAS v. BALDWIN ET AL.

PROMISSORY NOTE.—Complaint.—Partnership.—A complaint which contains a copy of a note, and in effect alleges that the defendants, by the name affixed to the note, executed it to the plaintiffs by the name by which the payees were designated in the note; that said note is due and unpaid, is sufficient. It was not necessary to allege the firm name and style in which the plaintiffs or defendants did business, but the averments did not vitiate.

SAME.—Denial of Execution by One Partner.—Evidence of Authority.—In an action against two or more on a note, one of the defendants may deny for himself, under oath, its execution, and if the note was made by a partner of that defendant, the answer would require proof that the giving of the note was within the authority of the partner, acting in the business of the partnership.

From the Clinton Circuit Court.

J. V. Kent and *O. E. Brumbaugh*, for appellant.

A. E. Paige, *S. O. Bayless* and *W. A. Staley*, for appellees.

BLACK, C.—The appellees sued the appellant and John L. Weaver, and recovered judgment against said Weaver upon his default, and against the appellant upon a verdict returned on the trial of issues formed. The appellant has assigned as error that the complaint does not state facts sufficient to constitute a cause of action.

The complaint, omitting its title and the signature of the plaintiffs' attorneys, was as follows:

“Dwight H. Baldwin, Lucien Wilson and Robert A. Johnson, plaintiffs, doing business under the firm name and style of D. H. Baldwin & Co., complain of John L. Weaver and

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John Lucas, defendants, doing business under the firm name and style of Weaver & Lucas, representing and composing the Frankfort Organ Company of the city of Frankfort, and say that heretofore, to wit, on the 18th day of December, A. D. 1882, the defendants executed and delivered to plaintiffs their certain promissory note, in the words and figures following, to wit:

“ ‘\$380.

DECEMBER 18, 1882.

“ ‘Six months after date we promise to pay to the order of D. H. Baldwin & Co. three hundred and eighty dollars, at Farmers’ Bank, for value received, without any relief whatever from valuation or appraisement laws, with eight per cent. interest from date until paid, and attorney’s fees.

“ ‘FRANKFORT ORGAN COMPANY, Per W.’

“ ‘That said note, with eight per cent. interest from date, and the further sum of forty dollars attorney’s fee, is now due, and remains wholly unpaid. Wherefore plaintiffs demand judgment for four hundred and fifty dollars and all proper relief.”

We think this complaint was sufficient. It was not necessary to allege in what name and style the plaintiffs or the defendants did business, but these allegations did not vitiate. The copy of the note set out became a part of the complaint, which in effect alleged that the defendants, by the name affixed to the note, executed it to the plaintiffs, by the name by which the payees were designated in the note. *Jackson v. Burgert*, 28 Ind. 36; *Napier v. Mayhew*, 35 Ind. 276.

The appellant has also assigned as error the sustaining of a demurrer to the amended third paragraph of his answer.

This paragraph was verified by the appellant’s affidavit, and alleged “that the note set out in the complaint and sued on in this action is not his note, and that he never executed the same; that he was not at the time of the execution of said note, nor at any other time, a member of the Frankfort Organ Company; that he never authorized said signature to said note, and that the same was not signed by any person

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having power to bind this defendant by said signature or otherwise."

The appellees say in their brief that a motion to strike out this paragraph of the answer was sustained, and that no exception was taken. We find, however, in the record as presented to us, that there was a demurrer to the paragraph, on the ground that it did not "state facts sufficient to constitute a defence to the plaintiffs' action herein." It appears that this demurrer was sustained, and that an exception to the ruling was taken by the appellant.

Where a pleading is founded on a written instrument, it may be read in evidence without proving its execution, unless its execution be denied "by pleading under oath, or by an affidavit filed with the pleading denying the execution," and proof of the names of the makers will not be necessary, unless the same shall be denied "by a pleading under oath, or by an affidavit filed as aforesaid." R. S. 1881, section 364.

In an action against two or more on a note, one of the defendants may deny for himself, under oath, its execution. *Pursley v. Morrison*, 7 Ind. 356.

If the note was made by one who was the partner of the appellant, this answer would have required proof that the giving of the note was within the authority of such partner, acting in the business of the partnership. *Graves v. Kellenberger*, 51 Ind. 66; *Maiden v. Webster*, 30 Ind. 317; *King v. Barbour*, 70 Ind. 35.

The pleading contains redundant matter, but we think it was error to sustain the demurrer thereto.

The judgment against the appellant should be reversed.

PER CURIAM.—Upon the foregoing opinion, the judgment against the appellant is reversed, at the costs of the appellees.

Filed Oct. 11, 1884.

Stockwell v Brant et al.

No. 11,679.

STOCKWELL v. BRANT ET AL.

INTOXICATING LIQUOR.—Application for License.—Appeal.—Amendment of Remonstrance.—On an appeal from a refusal by the county board to grant a license to sell intoxicating liquor in a less quantity than a quart, the circuit court may permit, at the costs of the remonstrator, an amendment making the remonstrance more specific and adding new specifications under the original objections, where no new parties are introduced.

SAME.—Evidence.—Opinion of Witness.—Upon the trial of such cause it is not proper for a witness to testify that in his judgment the applicant was a man fit to be trusted with a license to sell intoxicating liquors.

SAME.—Harmless Error.—Evidence that the applicant's former place of business had been on a much frequented street was immaterial, but its admission could not harm the applicant, and is not available error.

SAME.—Former Place of Business.—Conduct of Customers.—Testimony as to the conduct of persons congregating around the saloon formerly kept by the applicant, and going in and out, was competent, although the former place was one where liquor was sold by the quart.

SAME.—Specific Acts.—Unfitness of Applicant.—The unfitness of applicant may be proved by specific acts. The question is not one merely of general character, but the jury may judge whether the specific acts prove unfitness in the person applying for the license.

INSTRUCTIONS.—Evidence Supporting Verdict.—Where all the instructions taken together fairly present the law to the jury, a single inaccurate instruction will not authorize a reversal of the judgment. Where the record affirmatively shows that the verdict was right upon the evidence, the judgment will not be reversed for error in the instructions.

From the Lawrence Circuit Court.

J. W. Buskirk and H. C. Duncan, for appellant.

BICKNELL, C. C.—The appellant applied to the county board for a license to sell intoxicating liquors in a less quantity than a quart at a time. The appellees were the remonstrators before the county board.

The county board refused to grant the license; on an appeal to the circuit court a jury returned a verdict that the appellant was not a fit person to be entrusted with a license, and judgment was rendered on the verdict, followed by this appeal.

97	474
128	200
97	474
135	78

97	474
139	124
139	213

97	474
145	463

97	474
151	74

97	474
160	406

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In the circuit court the appellees, over the objection of the appellant, were permitted to amend the remonstrance they had filed before the county board, and a motion by the appellant to dismiss the amended remonstrance was overruled. The action of the court as to the amendment is assigned as error.

In *Miller v. Wade*, 58 Ind. 91, it was held that the circuit court had no power, after the withdrawal of a remonstrance to permit a new party to appear and file a remonstrance. And the general rule is that appeals from the county board are tried in the circuit court on the issues made before the county board. *Lowe v. Ryan*, 94 Ind. 450; *Green v. Elliott*, 86 Ind. 53; *Breitweiser v. Fuhrman*, 88 Ind. 28. But the issues made below are subject to proper amendments in the appellate court under the general rules of law. *Hedrick v. Hedrick*, 55 Ind. 78; *Cummins v. Shields*, 34 Ind. 154; *Lowe v. Ryan*, *supra*, on p. 453.

In *Goodwin v. Smith*, 72 Ind. 113 (37 Am. R. 44), which was an application for a liquor license, this court said: "In highway cases, the practice has uniformly been to permit such amendments, and we can see no reason why the same rule should not apply to the class of cases to which the one under discussion belongs."

The leave to amend in the present case was granted at the costs of the appellees. There were no new parties introduced. The amendments made the remonstrance more specific, and added new specifications under the original objections. There was no error in granting the leave to amend the remonstrance, or in overruling the motion to dismiss it.

The only other error assigned is overruling the motion for a new trial. The only reasons for a new trial discussed in the appellant's brief are:

1. Excluding certain testimony of the witness John Anderson. The appellant proposed to prove by this witness, "that, in his judgment, the appellant was a man fit to be en-

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trusted with a license to sell intoxicating liquors." There was no error in excluding this testimony. *Yost v. Conroy*, 92 Ind. 464 (47 Am. R. 156).

2. The admission of certain testimony of the witnesses, Adonis, McGee and Allen. The testimony of Adonis was, that the appellant, "a year before, had kept a quart saloon on College avenue in Bloomington, and that about 600 children and 200 college students passed there daily twice a day." This was immaterial, and might properly have been excluded, but the fact that the defendant's place of business had once been on a much frequented street could not harm the appellant, and the admission of such testimony is not an available error. *Kimble v. Seal*, 92 Ind. 276; *Mills v. Winter*, 94 Ind. 329.

The witness McGee testified that when the appellant, more than a year before the trial, kept his quart saloon in Bloomington, there was a hallway in the same building, leading upstairs and next to the saloon, which was on the ground floor, and that witness had seen men drinking in that hallway, and vomiting there; that drunken men were congregated in the hallway; that he had seen drunken men coming in and out of the saloon and collecting in front thereof.

The witness Allen testified that drunken men were in the habit of congregating in front of the appellant's said saloon. The objections to the testimony of these witnesses were that it was irrelevant, incompetent and immaterial. If it was immaterial it was harmless, but we think it was not incompetent; it was for the jury to determine whether a liquor seller, about whose premises such things were usual, was a fit person for the license he was seeking.

3 and 4. The objections to the introduction of the record of the conviction of the appellant in the Monroe Circuit Court for unlawfully selling intoxicating liquor to be drunk on his premises, and to the testimony of John Kelly that he had seen the appellant playing poker for money on Sunday, were, that such evidence was immaterial, irrelevant and in-

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competent, and that the unfitness mentioned in the statute can not be proved by specific acts. But we think such unfitness can be proved by specific acts. It is not a question merely of general character. It is for the jury to determine whether the specific acts show such an immorality or unfitness as should defeat the application for a license. *Keiser v. Lines*, 57 Ind. 431. There was no error in admitting the evidence now under consideration.

5. The last reason for a new trial discussed in the appellant's brief is that the court erred in its instructions to the jury Nos. 7, 8 and 9.

The following rules are established in Indiana in reference to objections to instructions:

1. Where all the instructions taken together fairly present the law to the jury, a single inaccurate instruction will not authorize a reversal of the judgment. *McDermott v. State*, 89 Ind. 187; *Louisville, etc., R. R. Co. v. Kelly*, 92 Ind. 371 (47 Am. R. 149); *Young v. Clegg*, 93 Ind. 371; *Louisville, etc., R. W. Co. v. White*, 94 Ind. 257.

2. Where the record affirmatively shows that the verdict was right upon the evidence, the judgment will not be reversed for error in the instructions. *Simmon v. Larkin*, 82 Ind. 385; *Norris v. Casel*, 90 Ind. 143. It is provided by statute that a judgment shall not be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below. R. S. 1881, section 658; *Brooster v. State*, 15 Ind. 190. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellant.

Filed Oct. 11, 1884.

Bloom *et al.* v. Franklin Life Insurance Company.

No. 11,618.

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BLOOM ET AL. v. FRANKLIN LIFE INSURANCE COMPANY.

LIFE INSURANCE.—*Forfeiture in Case Assured shall Die from Intemperance, or in known Violation of Law.*—A provision in a policy of insurance providing that it shall be forfeited, in case the assured shall die by reason of intemperance, or while engaged in the known violation of law, is valid and enforceable.

SAME.—*Pleading.*—*Death of Assured Resulting from Commission of Assault and Battery.*—To a suit upon a life insurance policy, an answer, alleging in general terms, that the assured came to his death while engaged in the known violation of law by committing an assault and battery, and specifically stating facts constituting an assault and battery, is sufficient, although the term “unlawful” is not used.

SAME.—*Death of Assured from Violation of Civil Law.*—It is immaterial whether the death of the assured resulted from the violation of a criminal law, or of a positive rule of civil law, provided the violation of law was such as increased the risk and naturally led to his death.

SAME.—*Proximate Cause of Death.*—It is sufficient to relieve the insurance company if the known violation of law was such as to proximately lead to the death of the assured by bringing him into danger of losing his life.

SAME.—*Right of Husband to Defend Wife when Assaulted.*—An assault upon the person of the wife of another is a known violation of law, and justifies the husband in interfering to protect the wife from violence.

SAME.—It is not necessary in order to work a forfeiture, that the assured should die in the act of violating the law, but it is sufficient if it appears that the wounds received while engaged in a known violation of positive law are the cause of his death.

SAME.—*Presumption.*—*Interference of Husband for Protection of Wife.*—The presumption is that men will act in conformity to their natural habits and propensities, and one who violently assaults the wife of another is presumed to know that he endangers his life, as the presumption is that the husband will resist the assault with force.

SAME.—*Excuse.*—*Voluntary Drunkenness.*—The voluntary drunkenness of the assured while engaged in the known violation of law, causing his death, will not prevent a forfeiture of the policy of insurance.

From the Superior Court of Marion County.

H. D. McMullen, D. T. Downey and F. Heiner, for appellants.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

Bloom *et al.* v. Franklin Life Insurance Company.

ELLIOTT, C. J.—The policy of insurance upon which the appellant's complaint is founded contains a provision that if the assured shall die by reason of intemperance from the use of intoxicating liquors, or in the known violation of the laws of the States or of the United States, the policy shall be void. The answer of the appellee, after setting forth the provision of the policy, proceeds as follows: "And this defendant avers that the said August Bloom, the assured, came to his death in the following manner, to wit: On or about the 29th day of December, 1881, the said August Bloom, while in a state of intoxication from the use of intoxicating liquors, did commit an assault and battery upon one Wilhelmina Bloom, the wife of his brother, Albert Bloom, at the town of Aurora, and State of Indiana, and while thus engaged in perpetrating said assault and battery, and while violently beating, bruising, choking and maltreating her, the said wife of his brother, he, the said August, being at the time in a state of intoxication, his brother, the said Albert, did then and there, for the purpose of lawfully defending his wife against said assault and battery, strike the said August Bloom upon the head with a jack plane, or some other wooden instrument, thereby fracturing the skull of him, the said August, and causing his death within a few hours thereafter."

There can be no question as to the force and validity of the provision of the policy declaring it to be of no effect in the event that the assured shall come to his death from the effects of intemperance, or while engaged in wilful violation of the law. We do not, indeed, understand the appellant as insisting upon the invalidity of this provision, but as asserting that the facts stated do not show that the assured died from the effects of intemperance, or that he met his death while engaged in knowingly violating the law.

We do not think that an answer, averring that the assured came to his death while engaged in violating the law, need be framed with the same precision as would be necessary in an indictment in a criminal prosecution. The rules of plead-

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ing in civil cases are not so rigid and strict as they are in prosecutions for criminal offences. We can not, therefore, accept as a just standard the rule which obtains in cases of indictments, but even in such cases the pleading is good if it describes the offence in the language of the statute, or in language of equivalent meaning.

The answer charges that the assured did commit an assault and battery, and then sets forth the facts constituting the offence. It is true that the language of the statute defining the offence is not pursued, but we do not think this was necessary, for all that it was incumbent upon the appellee to do was to state such facts as would enable the court to conclude as matter of law, that there was an assault and battery committed. The facts stated warrant this conclusion. It is not necessary in a complaint to anticipate defences, nor is it necessary in an answer to anticipate matters that might be replied in avoidance. In the one case it is sufficient to make a *prima facie* cause of action, and in the other, to make a *prima facie* defence. We can see no reason for taking this case out of the general rule. It is true forfeitures are odious and that courts are slow to enforce them, but this consideration does not affect the rules of pleading. The reluctance of courts to enforce forfeitures does not change the rules of pleading, but does, in a high degree, affect the causes assigned in support of the claim of forfeiture. The question, under the rule against enforcing forfeitures is not in what manner are the grounds of forfeiture pleaded, but it is, what are the grounds? Are they so important and material as to compel a declaration of forfeiture? If, in this case, the answer shows that the assured came to his death in the known violation of law, then there is a cause of forfeiture shown, no matter how inartistically drawn the pleading may be; for the inquiry is, not as to the manner of pleading, but as to the substance of the plea. It seems quite clear that the facts stated would be abundantly sufficient in a complaint to recover damages for an assault and battery, and if this be

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true, there is no reason why they should not be sufficient when the assault and battery is pleaded as a defence. If the facts are such as show an assault and battery, then, if an assault and battery is a defence, the pleading is sufficient, no matter what may be the character of the action in which it is interposed. The pleading under immediate mention does state facts constituting an assault and battery, and does show an offence involving a wilful violation of law. At all events the facts stated in the answer, and admitted by the demurrer, are enough to put the appellants to a reply.

Granting it to be true, as decided in *Cluff v. Mutual, etc., Insurance Company*, 13 Allen, 308, that the violation of law must, in order to avoid the policy, be a breach of some criminal statute, still the answer is good, for courts judicially know that an assault and battery is an offence punishable as a crime. The words "assault and battery," employed in the answer, have, and for centuries have had, a definite and settled meaning, and we can assign that meaning to them, not only without encroaching upon any rule of law, but in close harmony with long and firmly settled principles. We may, with justice and propriety, apply to the pleading before us the rule adopted in *Burk v. State*, 27 Ind. 430, where it was held that a crime was well defined if the Legislature employed a phrase of a definite and settled meaning. In that case the phrase was "public nuisance," and it was held to be a sufficient definition of the offence. *State v. Berdette*, 73 Ind. 185, *vide* opinion, 196; S. C., 38 Am. R. 117. Taking the general words used in the answer, in conjunction with the statement of specific facts, and it appears, with reasonable certainty, that there was a violation of a criminal statute. We do not affirm that the words "assault and battery" would of themselves be sufficient.* Not that, by any means; but we do affirm that the words, used as they are in that clause of the answer, reading, "while thus engaged in perpetrating said assault and battery, and while violently beating, bruising, choking and mal-

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treating her, the said wife of his brother," are to be considered in determining the character of the violence used upon the person of Mrs. Bloom. The words have a settled meaning quite as full and definite as the word "unlawful," and it is but following the ruling in *Burk v. State, supra*, to give them their well known meaning. If the word "unlawful" had been used, the substantial requisites of an indictment would have been present. *State v. Smith*, 44 Ind. 557. It seems to us that the words used, taken in connection with those with which they are immediately associated, and in connection with the clause contained in the concluding part of the answer, which reads, "And this defendant says that by reason of his said intoxication and of his said violation of the law in committing such assault and battery, the said August Bloom was then and there in the known violation of the laws of Indiana," fully show that an offence punishable by the criminal laws of the State was committed by the assured. We do not hold that the averments in the concluding part of the answer control, but we do hold that in determining the whole tenor and drift of the pleading they are proper for consideration.

The soundness of the decision in *Cluff v. Mutual, etc., Ins. Co., supra*, upon the point immediately under discussion, is questioned in the well considered case of *Bradley v. Mutual, etc., Ins. Co.*, 45 N. Y. 422, and was denied in the same case by the Supreme Court of New York. It does seem a wide stretch of judicial power to affirm that a clause reading, "Or in case he shall die by his own hand, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of any law of these States, or of the United States, or of the said provinces, or of any other country which he may be permitted under this policy to visit or reside in, this policy shall be void," refers solely to criminal laws. If the words employed are taken in their usual signification, it would seem quite clear that death in the known violation of any law, criminal or civil, would make the policy inoperative. An

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illustration was put by GROVER, J., in *Bradley v. Mutual, etc., Ins. Co., supra*, which goes far to show the unsoundness of the decision in *Cluff v. Mutual, etc., Ins. Co., supra*: "Again, suppose the death occurred from injury received while the assured was attempting to obtain, by force, the possession of a chattel of which another was in peaceable possession, the title to which was claimed by both, but which was really in the assured, the case would come within the proviso, for the reason that the risk was increased, and the death caused by the violation of law by the assured, although such law was the civil only, the deceased having committed no breach of the peace or any indictable offence." Suppose, as a further illustration, that the law prohibits a passenger from standing on the platform of a railway car while in motion, or that it prohibits persons from approaching within a specified distance of a blast about to be fired, would not a known violation of such a law increase the risk, and be within the letter and the spirit of the provision in the policy? On the other hand, it is not every violation of law which should absolve the company even though the law be a criminal one. Suppose a man violates our law against profanity, and is shot while doing it, should that absolve the company from liability? Again, suppose a man violates our Sunday-law by fishing, and while committing the offence is shot and killed, would that relieve the company? In a late case, *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550 (21 Am. R. 541), a rule was declared which it seems difficult, if not impossible, to reconcile with that laid down in *Cluff v. Mutual, etc., Co., supra*, for it was held in the later case that where an assured submits to a surgical operation for the purpose of producing abortion, there can be no recovery upon the policy. It is true that the opinion puts the decision upon the ground of public policy, but when the real reason for the decision is reached, it will be found that it rests upon the ground that the act was in violation of the rights of the insurance company, for an act against public policy can not relieve the company unless it is one increasing the risk. If a

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man should violate public policy by entering into an illegal conspiracy to prevent competition at a public sale, and this should lead to his death, we suppose no one would claim that because his act was against public policy, the insurance contract was avoided. Again, if an assured should enter into a conspiracy to corruptly control the acts of a government official, or should enter into a marriage brokerage contract, and these acts should lead to his death, it would be clear that the policy of insurance would not be rendered void. In our opinion the law is this: A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk.

✓ Whether the violation of law was the proximate cause of death, and whether it was an act increasing the risk, must in general be determined from the facts of the particular case. There must in all cases, whether the law violated be a criminal or a civil one, be some causative connection between the act which constituted the violation of law and the death of the assured. A man engaged in uttering counterfeit money might meet his death while so engaged, and yet there might be circumstances which would destroy the causal connection between the death and the violation of law, and in such a case it is clear that the company would not be relieved from liability. On the other hand, an assured might bring on his death while engaged in the violation of a civil law, as, for instance, in the case of an attempt to force an entrance into a man's house for the purpose of arresting him on civil process. Another illustration may be found in the case of a railway engineer who, in violation of law, neglects to sound signals and brings on a collision in which he perishes, and a hundred examples are supplied in cases of collisions at sea or on navigable streams, brought about by a violation of maritime

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laws. It would not be difficult to multiply examples proving that the rule must be that the known violation of a positive law relieves the company where the act constituting the violation is the proximate cause of death, whether the positive law violated be a civil or a criminal one.

The act of the assured in this case was the proximate cause of his death within the meaning of the law. A man who makes a violent assault upon a woman puts his own person in danger, for a father, a husband, or a child may interfere to protect the assailed woman, and may overcome the assailant by force. Strangers not only may interfere to protect the person violently assaulted, but are, in strict law, under a duty to interfere. The natural result of such an illegal act as that of the assured, therefore, was to bring his person into danger, and as death resulted his own act was the proximate cause. It may well be doubted whether an assured who violently assaults another does not cause a forfeiture, even though the rescuer uses excessive force; but that point we need not decide, for the interference in this instance was a lawful one. While the unlawful act of the assured must tend in the natural line of causation to his death, in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the precise consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for, in such a case the ultimate result is traced back to the original proximate cause. *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346; *Cincinnati, etc., R. R. Co. v. Eaton*, 94 Ind. 474; *Dunlap v. Wagner*, 85 Ind. 529 (44 Am. R. 42); *Binford v. Johnston*, 82 Ind. 426 (42 Am. R. 508); *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166; S. C., 40 Am. R. 230. In the case of *Cluff v. Mutual, etc., Co.*, *supra*, the decision was, that where the assured made an assault upon another, and the person assaulted killed him, the policy was forfeited. The same general doctrine was maintained in *Bradley v.*

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Mutual, etc., Ins. Co., supra, but it was held that where there was any conflict of evidence, the question of whether the death was the natural result of the wrongful act must be left to the jury. In the case of *Insurance Co. v. Seaver*, 19 Wall. 531, the assured was driving in a race, a collision took place, he leaped from his sulky and was killed, and the court held that death was proximately caused by the unlawful act of racing. The subject received consideration in *Miller v. Mutual Benefit Ins. Co.*, 34 Iowa, 222, where the assured, while suffering from a fit of *delirium tremens*, escaped from his keepers, ran out into the street in very inclement weather, and, by the exposure, brought on another form of disease which was the immediate cause of death. The court held that the proximate cause of death was the excessive use of intoxicating liquor. But there is really no reason for endeavoring to find insurance cases, for the fundamental principle must be the same whether the contract is one of insurance or an ordinary commercial agreement. The fundamental principle is as old as the "Squib Case" on the civil side of the common law, and on the criminal side as old at least as the time of Sir Matthew Hale. 1 Hale P. C. 428; 1 Hawk. P. C. 93; *Kelley v. State*, 53 Ind. 311; *Harvey v. State*, 40 Ind. 516; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346, auth. p. 350.

Courts can not be ignorant of the nature of men, and must attribute to them the ordinary passions and weaknesses inherent in human nature. It has been expressly adjudged that courts may presume that domestic animals will act in conformity to their usual propensities and habits, and surely there is stronger reason for extending this principle to beings of intelligence, reason and affections. Wharton Neg., sections 100, 107; *Billman v. Indianapolis, etc., R. R. Co., supra*. It has, indeed, been laid down by respectable authority that notice will be taken of the habits of men acting in masses, and if this be true, it must also be true that notice will be taken of what an ordinary man would likely do under a known state of affairs. Wharton Neg., section 108. These consid-

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erations lead to the conclusion that a man who beats and maltreats another's wife may reasonably expect the husband to defend her without being careful to select the means of defence, or to nicely weigh the degree of force. To expect a husband to act coolly and with careful circumspection in such a case is to expect an unreasonable thing. The probability is that the husband will in such a case use force, and this makes it probable that the one who assaults the wife will encounter force at the hands of the husband, and what is probable is, in legal contemplation, to be expected. *Billman v. Indianapolis, etc., R. R. Co., supra*, and authorities cited. If, therefore, an assured does assault another's wife, he does an unlawful thing which he must expect will bring upon him violence from the husband, and if this force leads to death, then the proximate cause of death is the unlawful act which provoked the use of violence.

The violation must be a known one, and we are inclined to think that the law violated must be a known one, that is, must be one of which the violator has, or should have, actual knowledge. But there are many things of which no man can be ignorant, and among the things of which no one can be ignorant is, that it is against the law to commit murder, to steal, or to violently beat another. We can not doubt that the beating of Mrs. Bloom was an act known by the assured to be a violation of law.

The fact that the assured was intoxicated when he committed the assault and battery upon his brother's wife does not change the law. Drunkenness is no excuse for crime. *Goodwin v. State*, 96 Ind. 550, and authorities cited. A man who voluntarily makes himself drunk is in a measure responsible for his own irresponsibility. But, waiving this consideration, the degree of intoxication does not appear to have affected the mental capacity of the assured, and the presumption here is, as in all cases, that the mental condition was a normal one.

There is no force in the proposition that the assured did not lose his life in a known violation of law, but in conse-

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quence of the violation. The cause of the cause is in law sufficient, and the cause of the cause of death was the blow given while the assured was in the act of violating the law, and it is not material whether death did or did not immediately ensue. *Terre Haute, etc., R. R. Co. v. Buck, supra.*

What we have said disposes of all the questions in the case, and it is not necessary to examine the special finding.

Judgment affirmed.

Filed Oct. 28, 1884.

No. 11,468.

CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY
v. LEVISTON.

BILL OF EXCEPTIONS.—*Change of Venue.*—A bill of exceptions filed in a court to which the venue is changed will not save an exception taken in the court from which the venue is changed, though the same judge preside in both courts.

RAILROADS.—*Killing Animals.*—*Complaint.*—*Name.*—In a complaint against a railroad company for killing animals while operating the road of another company, it is not necessary under the statute, R. S. 1881, section 4025, to allege in what name the road was being operated.

TRANSCRIPT.—Reference in a transcript, for documents, to a bill of exceptions not in existence until after the ruling concerning the documents, is not sufficient.

From the Fayette Circuit Court.

R. D. Marshall and *T. D. Evans*, for appellant.

J. W. Connaway and *J. R. Mitchell*, for appellee.

BLACK, C.—The appellee brought this action before a justice of the peace of Union county against the appellant, to recover the value of certain animals owned by the plaintiff killed by the defendant's trains, the places at which the animals entered upon the railroad track not being securely fenced. Judgment upon default was rendered against the defendant for \$70.

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The defendant appealed to the Union Circuit Court, and there entered a special appearance, and moved to quash the summons and return. This motion having been overruled, the defendant demurred to the complaint, and the demurrer was overruled. Upon the defendant's application, the venue was changed to the Fayette Circuit Court, where a trial by jury resulted in a verdict for the plaintiff for the same amount. A motion made by the defendant for a new trial having been overruled, judgment was rendered on the verdict.

The appellant has assigned as errors, and discussed in argument, the overruling of the motion to quash the summons and return, the overruling of the demurrer to the complaint, and the overruling of the motion for a new trial.

The motion to quash was overruled on the 13th of June, 1882, and the Union Circuit Court then gave sixty days' time "from day of trial" to file a bill of exceptions. The trial was had on the 16th and 17th of October, 1883, in the Fayette Circuit Court. The motion for a new trial, made the next day, was overruled on the 23d of October, 1883, and the court then gave sixty days from that date in which to file a bill of exceptions. There is in the record but one bill of exceptions, which was presented to the judge and signed on the 13th of December, 1883, and filed on the 17th of the same month. This bill contains the summons and return, and the written motion to quash, and states the ruling and exception thereto.

To present to this court an exception to the overruling of this motion, it was necessary that the grounds of the motion should be shown by proper bill of exceptions. *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315, and cases there cited. In *Lansing v. Coats*, 18 Ind. 166, it was said that the time fixed by the court for the filing of the bill of exceptions should be definite and reasonable.

The manner of giving time adopted by the Union Circuit Court in the case at bar would sometimes lead to great uncertainty and vexation, and it is certainly not commendable. Whether it may be permitted we need not here decide, for the

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exception to the decision of the Union Circuit Court could not be preserved by a bill filed in the Fayette Circuit Court, though the same judge presided in both courts. *McMahan v. Spinning*, 51 Ind. 187. The ruling upon the motion to quash is, therefore, not before us.

The complaint was in three paragraphs. In the title the parties were named as follows: "William R. Leviston v. The Cincinnati, Hamilton and Dayton Railroad Company, operating the Dayton, Michigan, Cincinnati, Richmond and Chicago, and Cincinnati, Hamilton and Indianapolis Railroads."

The first paragraph was as follows: "William R. Leviston, plaintiff, complains of the Cincinnati, Hamilton and Dayton Railroad, operating the Dayton and Michigan, Cincinnati, Richmond and Chicago, and Cincinnati, Hamilton and Indianapolis Railroads, defendant, and for cause of complaint says that the defendant, on the 20th day of June, 1881, and ever since, and now is operating, running and controlling the Cincinnati, Hamilton and Indianapolis Railroad, and that while said defendant, by her agents and employes and servants, was engaged in running, controlling and operating that portion of the defendant's road through the county of Union, in the State of Indiana, to wit, on the 20th day of June, 1881, within said county of Union and State of Indiana, run one of her locomotives and train of cars attached thereto, against and over one sow hog, then and there and thereby killing and destroying said hog, then the property of the plaintiff, in the sum of twelve dollars; and that the said damage and killing of said animal did not result from the negligence and carelessness of the plaintiff; and that at the time and at the place when and where said animal entered upon the grounds and railroad track so run, controlled and operated by the defendant as aforesaid, was not securely fenced, and said fence maintained as and by the statute law of the State of Indiana in such case made and provided. Wherefore," etc.

The second paragraph charged the killing of the plaintiff's heifer, of the value of \$40, on the 8th of September, 1881.

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The third paragraph charged the killing of his two hogs, each of the value of \$9, on the 11th of February, 1882. The second paragraph named the defendant as "The Cincinnati, Hamilton and Dayton Railroad Company, operating," etc. Otherwise the second and third paragraphs were like the first.

While in each paragraph the place at which the killing was alleged to have been done was spoken of as being on a portion of the defendant's road, yet each paragraph, taken as a whole, must be construed, we think, as charging that the killing therein alleged was done on the Cincinnati, Hamilton and Indianapolis Railroad, which at the time was being operated, run and controlled by the defendant.

It is contended on behalf of the appellant, that, to make the complaint state a cause of action against the appellant, it was necessary to allege in what name the appellant was operating, running and controlling the Cincinnati, Hamilton and Indianapolis Railroad.

Prior to March 4th, 1863, there was no liability, and no action would lie, for the killing or injuring of animals by the locomotives, etc., run on a railroad, on the ground that the railroad was not securely fenced, except against the railroad company owning the road; so that if that company were insolvent and in the hands of a receiver, assignee, lessee or other person or corporation operating the road, a judgment for the killing of animals, such as could be obtained on the ground that the road was not fenced, could not be collected. *Indianapolis, etc., R. R. Co. v. Solomon*, 23 Ind. 534.

At the date mentioned, a statute was enacted (1 R. S. 1876, p. 751), the first section of which provided as follows: "That lessees, assignees, receivers, and other persons, running or controlling any railroad, *in the corporate name of such company*, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of this act."

The second section provides: "That whenever any ani-

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mal or animals shall be or shall have been killed or injured by the locomotives, cars, or other carriages used on any railroad in, or running into or through this State, *whether the same may be or may have been run and controlled by the company, or by the lessee, assignee, receiver or other person*, the owner thereof may go before some justice of the peace of the county in which such killing or injuring occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days notice to be served on the *railroad company*, by the service of a summons by copy on *any conductor of any train* passing into or through said county." Provision is made in this section for the bringing of the action in the court of common pleas, or the circuit court, or before a justice, if the injury amounted to more than fifty dollars.

The next section provides, that if the complaint be filed in the court of common pleas, or in the circuit court, the summons shall be served by the sheriff "*on the railroad company defendant*," and that the "summons may be served by copy on *any conductor on any train* on said road passing into or through said county."

The fourth section is as follows: "The action may, *in all cases contemplated by this act*, be brought against the railroad as defendants, whether the same is or was being run by the company or by a lessee, assignee, receiver, or other person in the name of such company."

The fifth section, after providing for the giving of judgment for the plaintiff without reference to the question whether the killing or injury was the result of wilful misconduct or negligence, or the result of unavoidable accident, proceeds to provide that if the case be one commenced in the common pleas or circuit court, the court shall, on motion of the plaintiff, on the rendition of judgment, or afterwards, at any time when notice of the motion has been served on the *railroad company* defendant, as there directed, order a writ to issue, directed to the sheriff, for any agent, conductor, employe of

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such railroad company, or of the lessees, receivers or assignees of such company, named in the motion, to appear and answer under oath as to the amount of money in their hands, if any, belonging to such company, or to such assignees, lessees or receivers, and as to the probable amount of money received by such agents, conductors or employes belonging to such railroad company, lessees, assignees or receivers; and provision is made for the making of an order by the court for the payment of such money into the clerk's office of the court.

The next section provides, that any person obtaining judgment before a justice for animals so killed or injured, may file a transcript in the clerk's office, and may, upon notice and motion, have the order and proceeding provided for in the fifth section.

The seventh section provides, that the act "shall not apply to any railroad securely fenced in, and such fence properly maintained by such company, lessee, assignee, receiver, or other person running the same."

The eighth section provides, that any agent, conductor or employe who shall refuse or neglect to perform or obey the order of the court as specified in the act, shall be deemed guilty of contempt, and fined, to which imprisonment may be added.

This statute of 1863 is still in force, except its first section, which has been amended. Before considering the amendment, we will examine the statute as it was before the amendment.

It will be observed that the statute contemplated liability of the company owning the road, and also of any lessee, assignee, receiver or other person running the road in the corporate name of such company. To enforce the liability of any of these, that is, "in all cases contemplated by this act," the action might be brought against the "railroad as defendants,"—this whether the railroad "is or was being run by the company or by a lessee, assignee, receiver, or other person in the name of such company." It was only necessary to name as defendant the railroad company owning the road. Under the judgment obtained

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against such defendant, that company, and also any lessee, assignee, receiver, or other person running the road in the corporate name of the company, would be liable; and a mode was provided of enforcing that liability by an order obtained on notice served on the railroad company defendant.

The whole proceeding for relief, including the manner of serving the summons and the mode of enforcing satisfaction of the judgment, was provided for by the statute.

The owner of the animal killed or injured was not required to learn before suing whether the railroad was run by the railroad company owning the road, or by a lessee or other person. He needed only to bring his action against that company; but he could not under the statute render liable any lessee, etc., except one running the road in the corporate name of that company. It was not necessary for the plaintiff, in his complaint against the railroad company owning the railroad, to allege that it was running the road in its corporate name, or how, or by whom, or in what name it was run, in order to render liable to the judgment obtained any lessee, etc., running the road in the corporate name of such company. See *Pittsburgh, etc., R. W. Co. v. Hunt*, 71 Ind. 229. A suit would not lie, under the statute, against a railroad company not owning the railroad, and not running it in the corporate name of the company that owned it, but running it in its own name. *Pittsburgh, etc., R. W. Co. v. Bolner*, 57 Ind. 572; *Cincinnati, etc., R. R. Co. v. Bunnell*, 61 Ind. 183; *Pittsburgh, etc., R. W. Co. v. Carrant*, 61 Ind. 38; *Pittsburgh, etc., R. W. Co. v. Hannon*, 60 Ind. 417. And when a complaint did not allege that a defendant shown by the complaint not to be the owner of the railroad was running or controlling it in the corporate name of the company owning it, such complaint was held to be insufficient as against such a defendant. *Cincinnati, etc., R. R. Co. v. Paskins*, 36 Ind. 380; *Jeffersonville, etc., R. R. Co. v. Downey*, 61 Ind. 287.

The first section of said act of 1863 was amended by the act of March 14th, 1877 (R. S. 1881, section 4025), which pro-

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vides: "Any railroad corporation, lessee, assignee, receiver, and other person or corporation, running, controlling, or operating any railroad into or through this State, shall be liable, jointly or severally, for stock killed or injured by the locomotives, cars, or other carriages run on such road, in the name in which the road was run or operated at the time, to the extent and according to the provisions of this act; and the bills of lading usually issued at any railroad station in the county in which such stock was killed or injured shall be *prima facie* evidence as to the character or name in which said railroad was owned, held, controlled, or operated." The statute contemplates the bringing of the action against the railroad company owning the railroad, as defendant, when, and only when, the road is or was being run by that company, or by a lessee, assignee, receiver or other person, in the name of such company. Section 4028, R. S. 1881.

When the name in which the defendant is sued is the name in which the road was run or operated at the time of the killing or injury, any person or corporation running, controlling or operating the road is liable. The owner of the animal need not be perplexed or misled as to the character in which the person or corporation running the road was doing so, or be in doubt as to the proper party defendant. He may proceed against a defendant by the name in which the road was run, of which the usual bills of lading will be *prima facie* evidence; and under a judgment obtained against the defendant in that name, the plaintiff may enforce the liability of any person or corporation running, controlling or operating the railroad, "to the extent and according to the provisions of this act."

We think that while the complaint should be examined with a view to the fact that the proceeding is wholly statutory, yet the statute should be construed liberally with reference to the remedial purpose of the amendment of 1877, and with a view to the fact that the statute provides for the bringing of such actions before justices of the peace. We do not

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think it necessary, in a complaint against a railroad company showing that the defendant was running, controlling or operating another railroad on which the killing or injury was done, to allege that such road was run or operated in the name of such defendant, or to allege in what name it was run or operated.

Each paragraph of the complaint showed sufficient facts. The only ground stated in the demurrer and insisted upon here, other than want of facts, was want of jurisdiction of the person of the defendant. It is contended that the complaint was subject to demurrer on this ground because, as is claimed, it showed that the animals were killed by the Cincinnati, Hamilton and Indianapolis Railroad Company. We see nothing in this worth discussion. The demurrer was properly overruled.

Counsel for appellant urge that the court erred in permitting certain witnesses to answer certain questions, but they have not indicated in what part of the record we may find such action of the court.

It was assigned as cause in the motion for a new trial, that the court erred in permitting the plaintiff to read in evidence certain papers which are not set out in the motion, but references have been made by the clerk in parentheses to the places where they may be found in the bill of exceptions, which was not in existence until long after the overruling of the motion. No question concerning these rulings is before us. *Burns v. Thompson*, 91 Ind. 146.

The refusal of the court to give the jury a certain instruction at the request of the defendant, and the giving of a certain instruction by the court of its own motion, were assigned as causes for a new trial. These instructions do not appear in the transcript except in the motion for a new trial. They could not thus be made parts of the record.

That the verdict was not sustained by sufficient evidence, and that the damages assessed were excessive, were the only other grounds for a new trial which have been pressed here by

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counsel. It can not be profitable to extend this opinion by stating the evidence. We have examined, and find that the verdict was sustained by the evidence, and that the damages were not excessive.

The judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the costs of appellant.

Filed Sept. 25, 1884.

No. 8167.

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PLEADING.—Demurrer.—*Joint and Several.*—A demurrer which recites that “The defendants separately and severally demur to the first and second paragraphs of the plaintiff’s complaint, and for cause of demurrer say that neither of said paragraphs states facts sufficient to constitute a cause of action against them,” is a separate demurrer as to each paragraph, but joint as to the parties defendants.

SAME.—Construction.—*Defendant Named.*—Where a particular defendant is last named in a paragraph of a complaint, and in a succeeding paragraph the words “the said defendant” are used, without other designation, it will be held that the reference is to the defendant last named.

REAL ESTATE, ACTION TO RECOVER.—*Complaint.*—*Husband and Wife.*—*Deed.*—*Conspiring to Defraud Wife.*—*False Pretence.*—*Mortgage.*—*Claim of Title.*—*Forged Deed.*—*Copy.*—*Particulars of Adverse Title.*—A complaint, which alleges that while the plaintiff was a married woman, the defendant knowing her husband to be of weak mind, confederated with him and a justice of the peace to induce her to execute a deed to property, the legal title of which was in her husband, but the equitable title in her, of which the defendant had knowledge, under the pretence of taking a mortgage to save the land to her, and to save her husband from arrest and imprisonment, which pretence was false, and alleging that defendant had possession of the land and claimed title under a deed, which as to her was a forgery, and asking that the land be reconveyed to her and damages be adjudged for its detention, states a good cause of action against the defendant. It was not necessary to file a copy of the deed, nor was it necessary to set out the particular title claimed by other defendants who asserted title under such deed.

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SAME.—*Possession.*—*Quieting Title.*—*Widow.*—*Verdict.*—Where one paragraph of a complaint is for possession of real estate, and a second paragraph is to have the title quieted, and the facts alleged show the plaintiff to be entitled to claim as widow in land sold by her husband, the jury may find the plaintiff has title and is entitled to possession of one-third part thereof, and that her title be quieted as to such third, although the complaint asserts ownership in all and asks to have such title quieted.

SAME.—*Defence.*—*Evidence.*—Where, in a suit for possession, the defendants answer by denial and make defence, it is unnecessary to prove possession, and if plaintiff prove title, defendants must show rightful possession.

DEED.—*Acknowledgment.*—*Record.*—*Evidence.*—*Denial of Execution Under Oath.*—*Burden of Issue.*—Under our statutes since 1852, a certificate of the acknowledgment of a deed in proper form makes a *prima facie* case in favor of the execution of the instrument as to the parties themselves and innocent third parties, and its introduction, or a copy thereof certified, is authorized as evidence. When a denial of the execution is made under oath, the affirmative of the question of its execution is upon the party claiming under it, and the burden of the issue so remains until its establishment to the satisfaction of the jury by such proof as will withstand and overthrow all of the evidence to the contrary.

SAME.—*Personal Signing or by Agent.*—*Instruction.*—Where, under a denial of the execution of a deed, all the evidence is directed to the question of a personal signature, there is no error in the court so limiting its instructions to the jury. If instructions are desired upon the question of an execution by a person authorized to sign for the person appearing as grantor, it must be requested.

SAME.—*Finding.*—*Non-Execution.*—*Notice of Claim.*—*Innocent Holders.*—Where the finding of the jury is that the grantor in a deed did not execute the same, it is immaterial whether persons claiming under the grantee in the deed had notice of the assumed grantor's claim of title.

INSTRUCTIONS.—*Undisputed Facts.*—*Effect.*—Where the evidence establishes facts, about which there is no opposing evidence or controversy, the court may instruct the jury as to the legal effect of such facts, and that they make or fail to make a case for one of the parties.

NEW TRIAL.—*Joint Motion.*—A joint motion for a new trial will be overruled if not well taken as to all joining therein.

From the Madison Circuit Court.

M. S. Robinson and *J. W. Lovett*, for appellants.

H. D. Thompson, *T. B. Orr* and *W. March*, for appellee.

ZOLLARS, J.—Action by appellee in relation to real estate; verdict in her favor, and over a motion for a new trial and other motions, judgment upon the verdict that she is the

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owner, and entitled to the possession, of the undivided one-third of the real estate, and for \$125 against appellant William Carver for the detention thereof.

Many alleged errors are argued as causes for a reversal of the judgment. The first is, that the court below erred in overruling the demurrer to the complaint, which is in two paragraphs.

It is contended that the defendants to the separate paragraphs are not the same, except, perhaps, William Carver. Each paragraph does not state a cause of action against all of the appellants. The complaint appears to have been amended. What the amendment was, does not appear, as the amended complaint only is set out in the record. The defendants to each paragraph are not separately set out. As we find the cause entitled in the record, all of the appellants are set out as defendants. All through the proceedings they were all treated as defendants. It was so in the demurrer, answers, motions for a *venire de novo*, for a new trial, and other motions. We can not say, therefore, that the entitling of the cause was the unauthorized work of the clerk in making up the record. That all of appellants were not mentioned in the body of the complaint, or that each paragraph does not state a cause of action against them all, does not show that they were not all parties defendants. They must all be treated as having been parties defendants in the trial court. Whether a cause of action is stated against all, is another question. There are twenty-four persons named as defendants, who are appellants here. In the first paragraph of the complaint, four of the appellants are specially named. As against these the pleader assumed to state a cause of action. As to those not so named there was no attempt to state a cause of action. In the second paragraph, fifteen of the defendants are specially named. As against these again, there was an attempt to state a cause of action, and again, as to those not named, there was no such attempt. The defendants thus

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specially named in the different paragraphs are not the same, except William Carver, and, possibly, one of the Johnsons.

The averments of the paragraphs are such as to make it certain that neither states a cause of action against any of the defendants except those specially named therein. Had the demurrer been several as to the defendants, it should have been sustained to each paragraph, as to all of them not so specially named. If, on the other hand, the demurrer was joint as to the defendants, and the paragraphs state a cause of action against any one of them, it was properly overruled. *Teter v. Hinders*, 19 Ind. 93; *Eichbrecht v. Angerman*, 80 Ind. 208; *Axtel v. Chase*, 83 Ind. 546; *Campbell v. Martin*, 87 Ind. 577; *Trisler v. Trisler*, 38 Ind. 282; *Bennett v. Preston*, 17 Ind. 291.

The demurrer filed in this case is as follows:

“The defendants separately and severally demur to the first and second paragraphs of the plaintiff’s complaint, and for cause of demurrer say that neither of said paragraphs states facts sufficient to constitute a cause of action against them.”

This demurrer, we think, is separate as to each paragraph of the complaint, but clearly joint as to the parties. The words “separately and severally” can not be applied both to the separate paragraphs and also to the defendants; we think they apply only to the separate paragraphs. Such would seem to have been the intent of the pleader. The “*defendants*” demur, and the conclusion of the demurrer is that a cause of action is not stated against “*them*.” The demurrer is the same as if written, the defendants demur to the first and second paragraphs of the complaint, separately and severally, and for cause, state that neither of said paragraphs states facts sufficient to constitute a cause of action against them.

This brings us to the question of the sufficiency of the paragraphs of the complaint, as against any of the defendants.

As to the first, it is sufficient to say, in this connection, that whether or not it states a cause of action against all of the defendants, or all of those therein specially named, it at least makes a case against William Carver for the recovery of real

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estate. As to him it is in strict compliance with the requirements of section 1054, R. S. 1881, which is the same as section 595, code of 1852. The paragraph is, therefore, sufficient to withstand the joint demurrer by all of the defendants.

The second paragraph is quite lengthy, tedious, and uncertain in detail. The substance of it is as follows: In 1853, appellee's father gave to her lands in Rush county, subject to a small encumbrance, and conveyed it to a trustee, to be held by him until her husband should pay off the encumbrance, when the trustee should convey it to her. In 1854, the trustee, with her consent, sold the land for enough to pay off the encumbrance and \$2,500 additional. In the same year, her husband, Ira Carver, and appellant William Carver, purchased land in Henry county, and paid for the same with appellee's \$2,500. With her consent, the money was thus applied as an investment for her. The land in Henry county having been sold, appellee's husband, acting as her agent, for her use and benefit, purchased the land in controversy, and paid for the same with the proceeds of the Henry county land. By mistake, the deed for this land was not made to appellee, but to her husband. In 1857, her husband was of weak mind and financially embarrassed. Appellant William Carver, with knowledge of the husband's condition, mentally and financially, and that appellee's money paid for the land, and with the intent to cheat and defraud her out of the land, confederated with the husband, and a justice of the peace, to get her to sign a deed to him, William Carver. To accomplish this, they and each of them, and especially William Carver, represented to her that the husband was overwhelmingly in debt, and that his creditors were about to arrest and imprison him; that he, William Carver, was security for her husband for a large amount; that if she would execute to him a mortgage upon the land to secure him, he would save her husband from arrest and imprisonment, and save the land for her and her children, and that in no other way could this be done. Believing and relying

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upon these representations, all of which were false, and known to the parties to be false, she signed what they told her was a mortgage. She never made any deed to William Carver, and the deed under which he claims to hold the land is as to her a forgery. During all this time she was the wife of Ira Carver, and continued to be and to live with him as such until 1875, when he died. She had no knowledge of the deed until 1870.

It is averred that William Carver has had possession of the land for the last fifteen years, the rental value of which was five hundred dollars per year; that he has laid off a portion of it into lots as an addition to the town of Alexandria, and that certain named parties claim and pretend to own some of the lots. The prayer of the paragraph is that the deed be declared fraudulent and void; that Carver be compelled to reconvey, or that a conveyance be made by a commissioner; that she may recover damages "in the premises," and for all other proper relief. In this summary of the paragraph we have used the name of William Carver, as the defendant against whom the paragraph is specially directed. His name, however, is not mentioned, except where it is averred that she "never made a conveyance in fee simple to said William Carver," and that after the pretended conveyance to him, the "said William Carver" laid off a portion of the land into town lots, etc. Aside from these instances the averments are "the said defendant."

The paragraph seems to have been carelessly and loosely drawn, but taking its several averments together we think it sufficiently appears that William Carver is the "said defendant." William Carver is the defendant last named in the first paragraph. The "said defendant," in the opening and subsequent portions of the second, was doubtless meant to refer to him as the antecedent. It is the well settled doctrine that each paragraph must be sufficient of itself, and that it can not be made good by reference to another paragraph for substantial averments. It has been held, however, and we

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think correctly, that it is not necessary to repeat the names of the parties in each subsequent paragraph, and that a reference may be made to them as the said defendant or defendants, or the said plaintiff or plaintiffs. *Thompson v. Edwards*, 85 Ind. 414. As William Carver is the defendant last specially named in the first paragraph, we think that "the said defendant" may be held to relate to him as the immediate antecedent.

As against him the second paragraph states a cause of action. It shows that, as between appellee and her husband, she was the owner of the land, although he held the legal title. Here again the paragraph is somewhat indefinite and argumentative, but sufficiently shows that appellant Carver did not purchase the land, or have any substantial interest in it; that under the false pretence of taking a mortgage to save the land to appellee, and to save her husband from arrest and imprisonment, he procured her signature to an instrument which is in form a deed, under which he is in possession, claiming the land as his own. It clearly states such a case of fraud as entitles appellee to have the deed set aside, and the title quieted in her. The paragraph does not make a case of trust, nor does it amount to a plea of *non est factum*.

The averment that she never executed a deed to William Carver is so limited by the other averments of the paragraph as to make it mean simply, that by reason of the alleged fraud the deed is invalid. *Woollen v. Whitacre*, 73 Ind. 198. The paragraph, we think, also states a cause of action against the other defendants therein named. As we have stated, in substance, it shows that appellee is the owner of the land therein described. As against those other defendants, it is stated that they claim and pretend to own some of the lots laid out by Carver. It is not shown what particular title they claim to have, nor from whom they acquired it, nor is it shown that they were or are in possession. In actions to quiet title it is not necessary to aver that the adverse claimant is in possession, nor is it necessary to set out in particular the na-

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ture of his claim. It is sufficient if it appears that his claim is adverse to, or is a cloud upon, the plaintiff's title. Section 611, 2 R. S. 1876, p. 254; section 1070, R. S. 1881; *Marot v. Germania Building Ass'n*, 54 Ind. 37; *Gillett v. Carshaw*, 50 Ind. 381; *Arnold v. Smith*, 80 Ind. 417; *Dumont v. Dufore*, 27 Ind. 263; *Jeffersonville, etc., R. R. Co. v. Oyler*, 60 Ind. 383.

Those defendants knew better than appellee could well know what their title is, and to what particular portion of the real estate. The paragraph sufficiently shows that they are making claims adverse to appellee's title. It was a challenge to them to set up their claim or enter a disclaimer. Section 613, 2 R. S. 1866, p. 254; *Ulrich v. Drischell*, 88 Ind. 354; *Hose v. Allwein*, 91 Ind. 497.

If they were innocent purchasers from William Carver, and thus not affected by his fraud, they could have set that up, or produced evidence of the fact upon the trial.

The paragraph is not based upon the deed, and hence it was not necessary to set out or file a copy of it with the paragraph. *Stribling v. Brougher*, 79 Ind. 328. Against the other defendants not named in the paragraph, it states no cause of action, but being good as to those named, the joint demurrer by all the defendants was properly overruled.

The paragraph does not purport to be in ejectment, and we think it is not. It has none of the elements of such a complaint, either in the statement of facts or prayer.

We have, then, one paragraph for possession, and one to quiet the title. No question as to the misjoinder of causes of action was raised by the demurrer. The statute authorizes the joinder of claims to recover the possession of, and to quiet the title to, real estate. Section 70, 2 R. S. 1876, p. 68; section 278, R. S. 1881.

The jury returned the following verdict: "We, the jury, find for the plaintiff, and that she is the owner in fee simple and entitled to the immediate possession of the undivided one-third of the real estate in suit, and we assess the plaintiff's damages as against the defendant William Carver at the sum of

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one hundred and twenty-five dollars." Upon the return of the verdict and answers to interrogatories, appellants moved for a *venire de novo*, on the ground that the verdict is defective, ambiguous and uncertain, as shown by the record. It is insisted here that the court below erred in overruling this motion.

The verdict is upon the whole complaint, and is a finding upon all the issues, against all of the defendants. There is nothing to show or indicate that it is based upon one paragraph alone. Buskirk Pr. 186. It is a finding, therefore, that appellee is entitled to the possession of the undivided one-third of the land as owner, and entitled to have her title quieted to the same. In this regard it is sufficient. In cases of this character it is not necessary that the jury should find upon each paragraph separately. See *Hershman v. Hershman*, 63 Ind. 451.

It is further contended that the verdict is ill, because the jury could not find that appellee was entitled to only a portion of the land described in the second paragraph. In that paragraph appellee asserts that she is the owner of the land therein described, and asks to have her title quieted thereto. We think that the jury had the right to find that she was entitled to have her title quieted to the undivided one-third of it, if the evidence justified such a finding. The general rule is, that any relief may be granted consistent with the case made by the complaint and embraced within the issues. Section 380, 2 R. S. 1876, p. 188; section 385, R. S. 1881; *Hunter v. McCoy*, 14 Ind. 528; *Board, etc., v. Reynolds*, 44 Ind. 509 (15 Am. R. 245).

The statute in relation to the recovery of real property and the settling of conflicting claims thereto provided, and still provides, that where there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against any one or more of the defendants the premises, or *any part thereof, or any interest therein*, or damages, according to the rights of the parties, but the recovery may not be for a greater interest than that claimed. Section 600, 2 R. S. 1876, p. 252;

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section 1060, R. S. 1881. Clearly, under this section, a plaintiff suing for the possession of real estate may recover for any part of it, or any interest therein, whether a divided or undivided interest. It was, and still is, further provided that the rules prescribed in cases of ejectment shall be observed, as far as applicable, in actions to quiet title. Section 612, 2 R. S. 1876, p. 254; section 1071, R. S. 1881. They have been so applied. *Zimmerman v. Marchland*, 23 Ind. 474. We think it clear that under these sections title to an undivided interest may be quieted under a complaint asking the title quieted to the whole.

It will be observed that the verdict is that appellee is the owner of, and entitled to, the undivided one-third of the real estate "in suit." To ascertain the real estate in suit, we must look to the pleadings; in this case, to the complaint. In our abstract and consideration of the second paragraph, we have treated the real estate therein described as being the same as that described in the first paragraph. In considering the objections urged to the paragraph, it was not necessary to be more exact. The descriptions, however, are not necessarily, in all respects, the same. In the first paragraph it is averred that appellee is the owner of the W. $\frac{1}{2}$, S. E. $\frac{1}{4}$, sec. 13, Tp. 21 N., R. 7 E., and also certain lots in the town of Alexandria, all in Madison county. The averment as to one of the defendants indicates that two of the lots had been carved out of the land, and are owned by him. Aside from this, the eighty acres seems to be intact. In the second paragraph the pleader refers to the land of which appellee had become and was still the owner, as "the said real estate described in the first paragraph of this complaint, to wit:" Immediately following this is a specific description, as follows, except the use of abbreviations: "The W. $\frac{1}{2}$, S. E. $\frac{1}{4}$, sec. 13, Tp. 21 N., R. 7 E., *excepting* that part thereof which had at that time been laid off into town lots, as an addition to the town of Alexandria." There is also an assertion of the ownership of certain lots, substantially as in the first paragraph. We must

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look to the specific description. The reference to the first paragraph can not, in any way, limit or extend it.

There is nothing in the paragraph to inform us what portion of the eighty acres of land had been laid off into town lots, whether much or little. That portion not laid off into lots was in "suit" under the second paragraph. The whole of it, with the inferential exception of two lots, was in "suit" under the first paragraph. If it be said that the second paragraph shows more of the land to have been laid off into lots than is shown by the first paragraph, then it may be said that the description in the first includes that in the second, as the whole includes the parts. The whole of the land then, as described in the first paragraph, was "the real estate in suit" included in the verdict. Thus, by a reference to the complaint, there is no difficulty in ascertaining what "the real estate in suit" is, and in rendering judgment upon the verdict.

In such case it can not be said that the verdict is ill for uncertainty and ambiguity, and that a *venire de novo* should be granted. There was no error therefore in overruling the motion. Whether the verdict is sustained by sufficient evidence, and whether the proper judgment was rendered upon the verdict, are different questions.

Two motions for a new trial were made; one by all of the defendants, and one by all except William Carver. Both were overruled. In the judgment the real estate is described as in the deeds in evidence, and substantially as in the second paragraph of the complaint. To the undivided one-third of that, the title is quieted in appellee, especially as against all claims under the deed introduced in evidence, which seems to be the deed mentioned in the second paragraph.

It is conceded by appellants in argument, that Ira Carver, husband of appellee, was the owner of the land described in the second paragraph of the complaint and in the judgment, prior to the 20th day of November, 1857, at which time he made a deed for the same to appellant William Carver. Their

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whole claim rests upon the deed from him. It is really conceded, too, and shown by the evidence, that appellee, as the widow of Ira Carver, who died in 1875, if she did not join in that deed, is the owner of and entitled to the possession of the undivided one-third of the said real estate, except, perhaps, what may have been sold by Carver. It is contended, however, that she did join in that deed. Whether she did or not, is the main question of fact in the cause.

Prior to the trial, appellants served a notice on appellee, that upon the trial they would introduce in evidence the said deed, which bears the names of appellee and her husband as grantors. Upon the service of this notice, appellee filed her affidavit denying the execution of the deed.

Proof of execution having been made, which, to the trial court, was sufficient to entitle the deed to be read in evidence, it was so read.

The third instruction to the jury was as follows: "The defendants have read in evidence a deed purporting to be executed by Ira Carver and plaintiff, Esther J. Carver, conveying said real estate to the defendant William Carver. The burden of proving that the plaintiff * * executed said deed is upon the defendants, and if the defendants have not proved by a preponderance of all the evidence in the cause that said plaintiff did sign her name to said deed; the plaintiff is entitled to a verdict in her favor, no matter how innocent the defendants may have been in their purchase. If, however, you find that Esther J. Carver did sign her name to said deed then your verdict must be for the defendants, whether the deed bears the true date of its execution or not; and this must be your verdict, though the plaintiff, when she signed said deed, believed it to be a mortgage. You will then see that an important point in controversy is as to whether the plaintiff signed said deed, and this you will determine, as well as all other facts submitted to you, from a careful consideration of all the testimony and circumstances in evidence, for you are the exclusive judges of the evidence and the credibility

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of the witnesses, and determine from the evidence what it proves and what it does not prove." Several objections are urged against this instruction. As related to the deed the argument is, first, that after appellants had made such a case as entitled the deed to be read in evidence, the burden of proof was shifted to appellee to prove the non-execution of the deed; second, that as the execution of the deed seems to have been acknowledged before an officer authorized to take acknowledgments, appellee can not, in this action, dispute the execution.

These two objections are so related that we consider them together.

The rule is well settled that in the absence of statutes upon the subject, the grantee, offering a deed in evidence, must prove its execution, whether it has been acknowledged and recorded or not; especially is this so if its execution is put in issue by a plea of *non est factum*. *Bowser v. Warren*, 4 Blackf. 522; *Doe, etc., v. Vandewater*, 7 Blackf. 6; Greenl. Ev., Redfield's 1st ed., sections 557, 569; *Id.*, 2d ed., sections 293, 294, 300.

The statutes of this State, like those of many of the other States, have made material innovations upon this rule. The code of 1852, in force when this cause was tried, provided that where a writing, purporting to have been executed by one of the parties, is the foundation of, or is referred to in any pleading, it may be read in evidence on the trial of the cause against such party without proving its execution, unless its execution be denied by affidavit before the commencement of the trial, or unless denied by a pleading under oath. Section 80, 2 R. S. 1876, p. 75; section 364, R. S. 1881.

Section 216 of the revision of 1843, which extended the rule to all parties to an action, whether the writing purported to have been executed by them or not, was continued in force by section 802, code of 1852. *Belton v. Smith*, 45 Ind. 291.

Section 304, 2 R. S. 1876, p. 158, provided as follows: "If either party at any time before trial allow the other an in-

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spection of any writing, material to the action, whether mentioned in the pleadings or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial of the cause, it may be so read, without proof of its genuineness or execution, unless denied by affidavit before the commencement of the trial." See section 478, R. S. 1881.

A failure to deny the execution by a pleading under oath has been held to be so far an admission of the genuineness of the instrument as to preclude its being controverted by proof. This rule would, perhaps, apply to a case like this where the denial is by affidavit. The reason of this ruling, as stated in the earliest decision upon the subject under these statutes, is that the party relying upon the instrument has a right to be forewarned of any contemplated attack upon it. *Unthank v. Henry County T. P. Co.*, 6 Ind. 125. The subsequent cases are based upon this. *Evans v. Southern T. P. Co.*, 18 Ind. 101; *Woollen v. Whitacre*, *supra*.

These statutes clearly include deeds, and recognize the rule as we have stated it to be, in the absence of statutes. Their purpose is not to shift the burden of proof, but simply to relieve the party relying upon a written instrument of the burden of making proof of its execution, unless the execution be denied under oath. It has been many times so decided. *Russell v. Drummond*, 6 Ind. 216; *Lucas v. Smith*, 42 Ind. 103. The affidavit, or plea of *non est factum*, throws back upon the other party the burden of proving the execution of the instrument, and thus the parties occupy the position they would have occupied were there no statutes upon the subject. *Pate v. First Nat'l Bank*, 63 Ind. 254; *Brooks v. Allen*, 62 Ind. 401; *Taylor v. Gay*, 6 Blackf. 150.

After making a *prima facie* case in favor of the execution of the writing, it may be read in evidence. The party making such proof may rely upon it, and in the absence of countervailing evidence, it will be sufficient to make his case. This, however, does not shift the burden of the issue to the

party denying the execution. In the case of *Fay v. Burditt*, 81 Ind. 433 (42 Am. R. 142), it was questioned, whether in any case, it is proper to say that the burden of an affirmative issue shifts in the course of a trial from one party to the other. We think, upon further consideration, that there is no hazard in saying that it does not as to any single proposition, such as to whether or not a written instrument was in fact executed by the party denying the execution. When the execution of an instrument is thus denied, the question is, did the party thus denying in fact execute it? The party relying upon it has the affirmative of that issue. The burden is upon him to establish that affirmative, and that burden will remain upon him until he establishes it to the satisfaction of the jury, not by a *prima facie* case alone, but by such proof as will withstand and overthrow all of the evidence to the contrary. There must be more than an equipoise of the testimony; there must be a preponderance in favor of the execution. If, upon the making of a *prima facie* case, the burden shifts to the other side, then it would follow that when the *prima facie* case is overthrown by weightier testimony, the burden shifts back again. To say that the burden thus shifts, is to say that it is constantly shifting from the stronger to the weaker side, as the testimony may make one side or the other stronger. Of course, when a *prima facie* case is made out in a case like this, the burden is upon the other side to meet it, or suffer defeat. As was said in the case of *Meikel v. State Savings Institution*, 36 Ind. 355: "This making out a *prima facie* case by the evidence, and thus casting the burden of meeting it on the other side, occurs in every-day practice."

It was said in the case of *Hayes v. Fitch*, 47 Ind. 21, that where a defendant has made out a *prima facie* defence, if the plaintiff would show matter in avoidance, the burden shifts upon him.

This imposition of the burden to meet a *prima facie* case, or to show matter in avoidance, is not the shifting of the burden of proof as to the fact in issue.

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Appellants made their defence under the general denial, as they had a right to do under the statute. By introducing in evidence the deed from Williams to Ira Carver, appellee's husband, and the deed which purports to have been executed by appellee and her husband, they made their defence, as against appellee's claim, dependent upon the validity of the latter deed. The defence thus took the shape of an affirmative defence, a defence of confession and avoidance; a confession of title in appellee as the widow of Ira Carver, and of avoidance, by the deed from her and husband to appellant William Carver. By the notice and affidavit in relation to this latter deed, the burden of proving its execution was clearly thrown upon appellants, and was not shifted from them by their making out a *prima facie* case.

The deed purporting to have been executed by appellee and her husband, apparently, was properly acknowledged and recorded. We can not hold, however, that the certificate of acknowledgment is conclusive upon appellee. To so hold, would put us in conflict with the cases of *Bowser v. Warren*, *supra*; *Doe v. Vandewater*, *supra*; *Mullis v. Cavins*, 5 Blackf. 77, and with our statutes upon the subject. We think, however, that under our statutes since 1852, a certificate of acknowledgment in proper form makes a *prima facie* case in favor of the execution of the instrument, not only as to innocent third parties, but as to the parties to the instrument also.

The statutes require that deeds shall be acknowledged. 1 R. S. 1876, p. 362, section 4; p. 364, sections 12 and 13; sections 2927-8 and 2947, R. S. 1881. To entitle a deed to be recorded it must be acknowledged. 1 R. S. 1876, p. 365, section 18; section 2933, R. S. 1881. When thus acknowledged and recorded in proper time, it is notice to the world, and when thus recorded, with the acknowledgment, exemplifications or copies of the record, and the record itself, are competent evidence against third parties, and the parties to the instrument, without the production of the original, or proof of its execution. 1 R. S. 1876, p. 367, section 30; 2 R. S.

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1876, p. 150, section 283; sections 462, 2952, R. S. 1881; *Lyon v. Perry*, 14 Ind. 515; *Winship v. Clendenning*, 24 Ind. 439; *Bowers v. Van Winkle*, 41 Ind. 432; *Abshire v. State, ex rel.*, 53 Ind. 64; *Morehouse v. Potter*, 15 Ind. 477.

A record of a deed without such acknowledgment is not competent evidence against any one. 1 R. S. 1876, p. 367, section 30; section 2952, R. S. 1881; *Westerman v. Foster*, 57 Ind. 408.

An acknowledgment is not essential to the validity of a deed, as between the parties to it, but it is apparent upon an examination of the statutes that, as to all parties, it is a very important matter. It is essential to the record of a deed, and thus becomes the basis of notice by record. The deed may be recorded; the record becomes notice to the world, and may be used as evidence, without the production of the deed or proof of its execution, because the acknowledgment is evidence of the execution.

If we had no further statutes than those above mentioned, we might be inclined to follow the Illinois cases cited, and hold that, with certain limitations, it is conclusive evidence.

It is provided, however, that neither the certificate of acknowledgment of a deed, nor the record, nor the transcript of the record thereof, shall be conclusive, but may be rebutted, and the force and effect thereof contested by any one affected thereby. 1 R. S. 1876, p. 368, section 32; section 2954, R. S. 1881. The reasonable construction of these several sections of the statute is, we think, that the certificate of acknowledgment is *prima facie* evidence of the execution of the deed, and that in all cases where the record is competent evidence, the deed is also competent, without further proof of its execution. See Abbott Trial Ev. 175, 693.

This, however, does not throw the burden of proof upon the party denying the execution. In this case appellants produced the deed, asserting its genuineness. That was denied by appellee. Appellants had the affirmative of the issue, and

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were bound to establish it by a preponderance of testimony or suffer defeat. The certificate of acknowledgment operated as evidence in support of the genuineness of the deed, and made a *prima facie* case for appellants, very much as the presumption of sanity operates as evidence in behalf of the State in criminal prosecutions. *McDougal v. State*, 88 Ind. 24. The burden was upon appellee to meet and overthrow the *prima facie* case, but the burden was not upon her to prove the non-execution of the deed. The court below did not err, therefore, in charging the jury that the burden was upon appellants to prove by a preponderance of the testimony that appellee executed the deed. If it be conceded that the appellants, except William Carver, were innocent purchasers from him, yet, the instruction is correct, so far as the portion of it under discussion is concerned, because if appellee did not execute the deed, she is in no way bound by it, and as to her title did not pass by it. *Mays v. Hedges*, 79 Ind. 288.

A third objection is urged to the instruction upon the ground that it directs and limits the attention of the jury to the simple question of the signing of the deed, and thus, in a measure, withdraws from them the more comprehensive question, as to whether the deed was in fact executed.

The argument is that a deed may be executed without an actual signing by the grantor, and our attention is directed to the case of *Nye v. Lowry*, 82 Ind. 316, where it was said: "The signature of the grantor in a deed, written by another at his request, or, though written without his knowledge, if adopted by him as his own, has the same validity as if written by his own hand—indeed, within the meaning of the law, it becomes his proper handwriting, and the deed so signed is of the same validity as if written by his own hand; and the deed so signed, acknowledged and delivered, if subject to no other vice, is in all respects effective."

This is undoubtedly the law, and in all proper cases the jury should be so instructed.

As will be noticed upon an examination of the instruction

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above set out, a portion of it is as follows: "And if the defendants have not proved by a preponderance of all the evidence in the cause that said plaintiff did sign her name to said deed, the plaintiff is entitled to a verdict in her favor. * * * You will then see that an important point in controversy is as to whether the plaintiff signed said deed."

After mature deliberation, we are of the opinion that there is no available error in this portion of the instruction as applied to the case. As has been seen, a deed purporting to have been executed by appellee and her husband to William Carver, was introduced in evidence to defeat her claim. If that deed was executed by her, she has no real claim. Upon the trial of the cause, appellee testified that she did not sign her name to the deed; that the signature thereto is not her signature, and that the first intimation she had that her name was upon the deed as grantor was when informed of it by William Carver, long subsequent to the date of the deed. No one saw her or claimed to have seen her sign it. The deed was delivered to William Carver by appellee's husband, apparently signed and acknowledged by her. Experts were examined *pro* and *con*, as to whether or not the signature was in fact her handwriting. During the trial no claim was made so far as shown by record, that any one signed appellee's name to the deed with her consent or knowledge, nor was there any claim so far as shown by the record, that any one signed her name without her knowledge, and that she afterwards adopted the deed as her own. Quite a number of witnesses testified that subsequent to the date of the deed, and after appellee and her husband had moved from the land, she told them that she and her husband had sold the land to William Carver. There was evidence too, that, subsequent to the deed, she held a note executed by William Carver for about \$900, which she collected. William Carver testified that this note was given for the land. Appellee admitted that she held and collected the note, but stated that she did not recollect for what it was given. So far as shown by any

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claim during the trial, this evidence was produced to show that she in fact signed her name to the deed, and not for the purpose of showing that any one signed it for her, at her request or with her knowledge, or that she adopted the deed after its execution. The theory upon the one side seems to have been that appellee executed the deed by signing her own name, and upon the other, that she did not. It was upon this theory, doubtless, and because no claim was made that the deed was otherwise executed, that the court gave the instruction.

When a theory is thus adopted, and acted upon below, with the concurrence of both parties, a judgment ought not to be reversed because the court instructs the jury in accordance with it. *Graham v. Nowlin*, 54 Ind. 389. Upon the theory as adopted and acted on below, it can not be said that the instruction was erroneous. In legal parlance, appellee might have signed her name to the deed by authorizing another to write it for her. If appellants wished a further explanation as to the mode of signing deeds, or if they claimed that there was evidence tending to show that appellee executed the deed by adoption, or by authorizing another to sign her name, they should have asked for a further and proper instruction, which they did not do. *Burgett v. Burgett*, 43 Ind. 78; *Powers v. State*, 87 Ind. 144; *Ireland v. Emmerson*, 93 Ind. 1 (47 Am. R. 364); *Simpkins v. Smith*, 94 Ind. 470; *Pence v. Makepeace*, 65 Ind. 345.

In the last case, *supra*, there was a question as to whether the beneficiary of a policy of insurance had assigned it. The court instructed the jury that in order to prove an assignment by the beneficiary, it must be proved that she signed her name to the assignment, etc. It was objected that the instruction omitted "all mention of or allusion to the possibility of her signing by another, that is, authorizing some one to sign for her." It was held that the objection was not available for the reasons: *First*. That no effort had been made to prove that she had authorized another to sign for her; and,

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Second. That if a fuller or further instruction was desired, it should have been asked for.

In the second instruction the court charged the jury as follows: "But the plaintiff further claims that if she can not recover the whole, she is entitled to the undivided one-third thereof by reason of being the surviving widow of said Ira Carver, who held the title thereto, while the plaintiff was his wife. There is evidence in the cause uncontradicted sufficient to entitle her to recover upon this claim, unless the evidence shows that she joined her husband in a deed conveying said real estate."

The argument against this instruction is: *First.* That the appellee made no such claim in the pleadings; and, *Second,* That it withdrew from the jury the question as to what the evidence was. We think that neither of these positions is tenable. In answer to the first objection, it is sufficient to say that it was not necessary that such claim should have been made in the pleadings. That such a claim was being made by appellee, may have been made known to the court as the evidence was being introduced, or by verbal statements. We have already seen that under a complaint for the whole of the real estate, appellee might recover a portion of it, or any interest therein. It would not have been improper for the court to charge the jury as to this rule of law, without any specific claim on appellee's part.

The second point has more of substance. In the first instruction the court charged the jury that appellee had failed to show that her husband, Ira Carver, had held the real estate in trust for her. The question of trust, as set up in the second paragraph, was thus eliminated from the case. This should be borne in mind in considering the second instruction, *supra*. That appellee was the widow of Ira Carver; that he had held the legal title to the real estate; that he executed a deed for said real estate to appellant William Carver in 1857, and that whatever title appellants had or claimed was

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through this deed, were facts about which there was no conflict of testimony, question or controversy. And thus there was no question that appellee was the owner of, and entitled to, the undivided one-third of the real estate, and to have her title thereto quieted as against appellants, unless she had joined her husband in conveying it away. When facts are thus established without controversy or opposing testimony, the court may instruct the jury as to the legal effect of such facts, and that they make or fail to make a case for one of the parties. *Dodge v. Gaylord*, 53 Ind. 365, and cases cited; *Moss v. Witness Printing Co.*, 64 Ind. 125, and cases cited; *Templeton v. Voshloe*, 72 Ind. 134; *Adams v. Kennedy*, 90 Ind. 318; Sackett Instructions to Juries, p. 17.

Mr. Thompson, in his work on Charging the Jury, at page 74, says: "But whilst it is improper for the judge to assume the existence of a fact in issue, yet, where the evidence is clear and conclusive as to the existence of the particular fact, and there is no evidence to the contrary, an instruction, assuming it as true, will not work a reversal of the judgment."

This brings us to the question of the sufficiency of the evidence. In the general verdict is included, necessarily, a finding that appellee did not execute the deed. The jury also found, in answer to interrogatories, that the only title appellants had or have to the real estate was, and is, through the deed from Ira Carver, appellee's husband, to William Carver, and that appellee did not execute that deed, nor any other, for her interest in the real estate. We can not reverse the judgment upon the ground that these findings are not sustained by sufficient evidence. Two deeds for the real estate were introduced in evidence, one from one Williams to Ira Carver, and one from Ira Carver to appellant William Carver.

Upon these deeds appellants relied to defeat appellee's claim. Whether or not she executed the deed to William Carver was the controlling question in the case. She testified positively that she did not execute that deed, nor any other, for her interest in the real estate. Upon that question the evidence was

sharply in conflict; that conflict was settled by the verdict in favor of appellee. Under the well settled rule this court can not disturb that verdict. If appellee did not execute the deed as found by the jury, then neither William Carver, nor any of the other appellants, had any title to or claim upon the undivided one-third of the real estate that could defeat her claim. If, as found, she did not execute the deed, it is immaterial as to whether or not any of the appellants, who were purchasers from William Carver, had notice of her claim before purchasing. If the case had turned upon a question of fraud in procuring the deed, the rule to be applied would be different.

With the finding of the jury that appellee did not execute the deed, there can be no doubt that every element of the case was made out as against William Carver. Such being the case, the joint motion for a new trial by all of the appellants was properly overruled. A joint motion for a new trial will be overruled if not well taken as to all joining in it. *First Nat'l Bank v. Colter*, 61 Ind. 153; *Robertson v. Garshwiler*, 81 Ind. 463; *Feeney v. Mazelin*, 87 Ind. 326.

As we have seen, a motion for a new trial by all of the defendants except William Carver was also overruled. Here, again, if the motion was not well taken as to all of the parties joining in it, it was properly overruled. As to some of the appellants, there was no proof that they were in the possession of any portion of the real estate, or that they claimed to own any portion of it. As we have seen, however, they all joined in an answer of general denial and made defence. This, under the statute, was such an admission of possession on their part as relieved appellee of the necessity of proving them to be in possession.

It is provided by section 1056, R. S. 1881, which is the same as section 597, 2 R. S. 1876, p. 252, that where, in a case like this, the defendants make defence, it shall not be necessary to prove them in possession. Where the possession of the defendants is thus established, and the right of recovery

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on the part of the plaintiff is shown, the possession is so far shown to be unlawful, as to throw upon the defendants the burden of showing their possession to be rightful. Nothing of the kind was attempted here, except the effort to show that appellee executed the deed to William Carver. *Holman v. Elliott*, 86 Ind. 231; *Voltz v. Newbert*, 17 Ind. 187; *Dobbins v. Baker*, 80 Ind. 52.

As to some of the appellants, it was shown by such evidence as the jury had the right to act upon, that they were in the possession of a portion of the real estate, claiming to own it as purchasers from William Carver. As against them appellee was clearly entitled to recover, if, as found by the jury, she did not execute the deed to William Carver. As to them the motion for a new trial was properly overruled, and because properly overruled as to them, it was properly overruled as to all joined with them in the motion. There was, therefore, no available error in overruling the motion for a new trial by the appellants except William Carver.

Other questions are discussed by counsel for appellants with much earnestness, but as they are covered by what we have already said, we do not extend this opinion to notice them separately. The judgment is affirmed, with costs.

Filed Oct. 16, 1884.

No. 11,278.

WILHELM v. HUMPHRIES ET AL.

SHERIFF'S SALE.—*Non-Redemption from Sale.*—*Sheriff's Deed.*—*Intervening Judgment.*—Where real estate is sold by the sheriff upon execution or order of sale, and, upon the non-redemption of the real estate from such sale within the year allowed by law therefor, a sheriff's deed is executed to the holder of the sheriff's certificate of sale, such deed will relate back to and take effect from the date of the sheriff's sale, so as to convey the real estate free from the lien of an intervening judgment against the execution debtor.

SAME.—*Right to Redeem.*—*Lien of Judgment.*—*Accounting for Rents and Profits.*—Where a judgment debtor has a naked right to redeem certain real

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estate, by the payment of a certain sum of money, the lien of the judgment, if any, on such right to redeem, will not entitle the judgment plaintiff to demand from the owner of the fee, in such real estate, an accounting for rents and profits thereof.

From the Grant Circuit Court.

J. A. Kersey, L. D. Baldwin, I. VanDevanter, J. W. Lacey and *W. VanDevanter*, for appellant.

J. L. Custer, for appellees.

Howk, C. J.—The only error assigned by the appellant, Wilhelm, on the record of this cause, is the sustaining of the appellees' demurrer, for the want of sufficient facts, to his complaint.

The appellant alleged, in his complaint, that at the April term, 1879, of the Grant Circuit Court, one Jason Wilson and Adam Wolfe, recovered a judgment against John H. and William Baldwin for \$244.32, without relief, etc., and with ten per cent. interest, and on November 22d, 1882, they duly assigned to the appellant such judgment for value, by an endorsement on the margin thereof; that at the April term, 1882, of said court, William Baldwin was found and adjudged by the court to be the surety of John H. Baldwin in such judgment; that said judgment was in full force and wholly unpaid, and that at and since the rendition of such judgment John H. Baldwin was the owner of a right to redeem a certain parcel of real estate in the town of Marion, in Grant county, which had been previously mortgaged to one Mary A. Turner, and the mortgage assigned by her to the appellee Charles W. Humphries, and then in force; and that said judgment, at its rendition, became a lien on John H. Baldwin's right to redeem such real estate from said mortgage.

The appellant further alleged that the appellee Mary L. Humphries claimed to own said real estate, and disputed his lien on said right to redeem the same, by virtue of a pretended sheriff's deed thereof, which was void, because her co-appellee and husband, Charles W. Humphries, on January 25th, 1878, filed his complaint in the court below to foreclose

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the said mortgage so assigned to him by Mary A. Turner against John H. and Estella Baldwin, and said Mary A. Turner and one Oscar A. Wickersham; that afterwards, on February 14th, 1878, one George W. Winchel was, on his own petition, made a party plaintiff in such foreclosure suit, upon the ground that he was a holder of one of the notes secured by the mortgage then in suit, and filed his complaint praying judgment and foreclosure; that immediately thereafter, on the day last named, the court proceeded to hear and determine such foreclosure suit upon the default of each and all of the defendants therein, for the amounts due and to become due to said Charles W. Humphries, and for the amount due the said George W. Winchel, and for the foreclosure of said mortgage and sale of the mortgaged premises, and adjudged and decreed accordingly, and for the costs of suit; and that there was no notice given to the foreclosure defendants of the said proceedings of said Winchel, and no appearance thereto by them or either of them.

The appellant further averred that on October 26th, 1878, the sheriff of Grant county pretended to sell said real estate by virtue of an order of sale issued to him, on said judgment and decree of foreclosure, to said Charles W. Humphries and George W. Winchel, and issued to them a certificate of such sale; that within a year thereafter Winchel assigned his interest in such certificate to said Charles W. Humphries, who procured the sheriff, at the expiration of one year from the date of such sale, to execute to the appellee Mary L. Humphries, a sheriff's deed of such real estate upon the surrender of such certificate; that, by reason of the premises, the sheriff's deed was void, and did not convey nor divest John H. Baldwin's right to redeem said real estate from said mortgage, nor invest the same in either of the appellees, or in any one else; that at the November term, 1881, of the court below, the said Mary L. Humphries commenced a suit therein against John H. and William Baldwin, David Miers and George Gere, to quiet her title to said real estate, and on the

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issues joined on her complaint, and the cross complaint of John H. Baldwin, and on the answers and reply therein filed, the court, at its April term, 1882, found and adjudged that John H. Baldwin had the right to redeem such real estate from Mary L. Humphries by paying her the sum of \$591, including all proper charges belonging to Mary L. and Charles W. Humphries, or either of them, on account of all payments or purchases made by them, or either of them, on account of such real estate, for any cause whatever.

And the appellant said that the appellee Mary L. Humphries was, and had been for forty months last past, in possession of said real estate, receiving the rents and profits thereof, which were reasonably worth \$15 per month, and then amounted to the sum of \$600; that the appellant was entitled to have an account rendered of such rents and profits, and to redeem such real estate from Mary L. Humphries, by paying her such sum as might be adjudged to be due her on the rendition of such account; that the appellant then offered to pay Mary L. Humphries any sum of money which the court might find due her on account of such real estate, on the rendition of such account and his redemption of such real estate. Wherefore the appellant prayed that the said sheriff's deed be set aside, and that he be allowed to redeem said real estate as aforesaid, and for all proper relief.

We are of opinion that the court committed no error in sustaining the appellees' demurrer to the appellant's complaint. The judgment in the foreclosure suit, mentioned in the complaint, may have been irregular and erroneous, but it was very far from being void. It is not pretended or claimed, either in the complaint or in argument, that there was any irregularity, informality or error in the judgment and decree of foreclosure in favor of the appellee Charles W. Humphries. But it is claimed that the alleged error of the court in permitting Winchel to become a party plaintiff in the foreclosure suit, and in rendering a judgment and decree in his favor, upon his complaint then filed, without notice thereof

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to the defendants in such suit, vitiated and avoided the proceedings had, and the sale made, and the deed executed, under and pursuant to the judgment and decree in favor of Charles W. Humphries.

The proceedings, sheriff's sale and deed to the appellee Mary L. Humphries were not void, although they might have been avoided, perhaps, in a proper suit instituted by the proper parties for that purpose, at the proper time. It will be seen, however, from the allegations of the complaint, that not only was the mortgage foreclosed, but that, pursuant to the decree of foreclosure, John H. Baldwin's title to and interest in the mortgaged real estate were sold by the sheriff long before the judgment was rendered, which was subsequently assigned to the appellant, and which is the basis of his supposed cause of action in the case in hand. Possibly, this judgment may have entitled the judgment creditor to redeem the real estate from the sheriff's sale thereof before the expiration of the year allowed by law for such redemption; but it was not so redeemed, and the sheriff's deed, subsequently executed, related back to the date of the sheriff's sale, and conveyed Baldwin's title to and interest in such real estate to Mary L. Humphries free from the lien thereon of such intervening judgment. *Hollenback v. Blackmore*, 70 Ind. 234; *Elliott v. Cale*, 80 Ind. 285; *Riley v. Davis*, 83 Ind. 1.

But the appellant further alleged that the court below, at its April term, 1882, found and adjudged that John H. Baldwin had the right to redeem such real estate from Mary L. Humphries, by paying her the sum of \$591. This was more than two years after the execution of the sheriff's deed to Mary L. Humphries. It is not shown in the complaint in this case upon what ground or for what cause the court found and adjudged that Baldwin was so entitled to redeem; but the appellant claims that his judgment against Baldwin became a lien on this right to redeem. In this we think the appellant is mistaken. Under our statute, all final judgments in the circuit court for the recovery of money or costs are liens upon

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real estate and chattels real. Section 608, R. S. 1881. But a right to redeem real estate is neither real estate nor a chattel real. It is not an estate of any kind in real estate; indeed, it may well be doubted whether a mere right to redeem real estate is subject even to levy and sale under an ordinary execution. Section 1105, R. S. 1881. But see section 752, R. S. 1881.

It is certain, we think, that if it were conceded that the appellant's judgment was a lien upon Baldwin's right to redeem the real estate described in his complaint, such lien upon a naked right to redeem would not entitle the lien-holder to demand that the owner of the fee in such real estate should account to him for the rents and profits thereof. So that, in any view of the case at bar, the appellees' demurrer to the appellant's complaint was correctly sustained.

The judgment is affirmed, with costs.

Filed May 13, 1884. Petition for a rehearing overruled Oct. 15, 1884.

No. 11,469.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY v. HEIM.

97 525
161 191

SUPREME COURT.—*Record.*—*Bill of Exceptions.*—*Summons.*—Where all defendants appear, the summons and return can only be brought into the record by bill of exceptions or special order; so, also, a pleading which has been struck out, and instructions given or refused which do not appear to have been filed.

SAME.—*Practice.*—*Verdict.*—*Interrogatories.*—Unless it appears by the record that the court has sent interrogatories to the jury, the answers thereto will not be considered by the Supreme Court.

From the Fayette Circuit Court.

R. D. Marshall and *T. D. Evans*, for appellant.

J. W. Connaway, *R. Conner* and *H. L. Frost*, for appellee.

BLACK, C.—The appellee brought his action in the Union

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Circuit Court against the appellant, the complaint being in two paragraphs, both under the statute, one for killing and the other for injuring a mule owned by the plaintiff.

A motion to quash the summons and return and a demurrer to the complaint were overruled. An answer was filed, the second paragraph of which was struck out on the plaintiff's motion. Issues having been formed, the venue was changed to the Fayette Circuit Court, where the cause was tried by a jury. The verdict was in favor of the plaintiff, and with it the jury returned answers to interrogatories propounded by the defendant. A motion made by the defendant for judgment on the answers to interrogatories, notwithstanding the general verdict, was overruled. The court also overruled a motion made by the defendant for a new trial, and rendered judgment on the verdict.

The state of the record in relation to the motion to quash the summons and return is the same as that of the record in the case of *Cincinnati, etc., R. R. Co. v. Leviston*, ante, p. 488, at this term, except that that case originated before a justice, and except that in the case at bar the summons and return were not set out in the bill of exceptions, which contained the written motion, but which, for the summons and return, referred to a page of the transcript where the clerk had inserted them.

The statute, section 650, R. S. 1881, excepts from the papers which are to be deemed parts of the record the "summons for the defendant, where all the persons named in it have appeared to the action."

The failure to insert the summons and return in a bill of exceptions would prevent our consideration of the motion to quash, if there were no other reason; but if they had been so inserted in the bill filed, we could not regard the question as before us, for the reason stated in the opinion in the case above mentioned.

Under the assignment that the court erred in overruling the demurrer to the complaint, the same questions have been

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discussed that were decided under a similar assignment in the case to which we have referred, and upon the authority of that case we must hold that there was no error in overruling the demurrer.

The paragraph of answer which was struck out was not made part of the record by bill of exceptions or order of court. Therefore, no question concerning that ruling is before us. *Stott v. Smith*, 70 Ind. 298.

It does not, in any manner, appear that the interrogatories to which the jury returned answers were submitted by the court to the jury. Therefore, we can not consider any question which the appellant seeks to present under the assignment that the court erred in overruling the motion for judgment on said answers, notwithstanding the general verdict. *Cleveland, etc., R. W. Co. v. Bowen*, 70 Ind. 478; *Elliott v. Russell*, 92 Ind. 526.

It was assigned as a cause in the motion for a new trial, that the verdict was not sustained by sufficient evidence. Upon examination we find that we can not disturb the conclusion upon the evidence, reached by the jury and the trial court. The motion for a new trial contained certain instructions, the giving of which to the jury was assigned as cause for a new trial, and other instructions, for the refusal to give which to the jury a new trial was asked.

The truth of the statement, in a motion for a new trial, of any action of the court assigned therein as a cause, must be otherwise shown by the record. No instructions, given or refused, are shown by bill of exceptions. The instructions refused are nowhere shown except in the motion for a new trial. The clerk has inserted in the transcript certain instructions as having been given by the court to the jury, with the signature of the judge at the end thereof. They do not otherwise appear except in the motion for a new trial. It is properly contended by the appellee that these instructions are not part of the record, because it is not shown that they were filed. *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110; *Elliott*

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v. *Russell, supra.* Neither the instructions given, nor those refused, can be examined. The judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion the judgment is affirmed, at the costs of the appellant.

Filed Sept. 25, 1884.

No. 10,575.

WIMBERG ET AL. v. SCHWEGEMAN.

VENDOR AND VENDEE.—*Deed.—Breach of Covenant.—Purchase-Money.—Eviction.—Surrender of Possession.—Nominal Damages.*—Where possession of real estate is taken under a deed, the payment of the purchase-money can not be defeated without showing an eviction or surrender of possession to the owner of a paramount title. The breach of the covenant gives a right to nominal damages, but a judgment will not be reversed for a failure to award them.

SAME.—*Injunction.—Equity.—Insolvency.*—An injunction may, in a proper case, be granted to restrain the collection of the purchase-money of real estate, where covenants are broken by the total failure of title, but where the grantee is in possession, he must show some equity entitling him to resort to this extraordinary remedy. One of the facts that must be shown is the insolvency of the grantor.

MORTGAGE.—*Foreclosure.—Insolvent Decedent.—Heirs.—Child and Widow.—Sale by Administrator.—Cross Complaint.—Quieting Title*—N. K. died insolvent seized in fee of lands, leaving, surviving him, a child, and also a childless widow, who had been the second wife of decedent and was still living. The administrator sold, under the order of the court, "all the estate which said N. K. had in said land liable to be sold for the payment of his debts, amounting to two-thirds of the fee, and no more." The land was subsequently sold by the purchaser at the administrator's sale, and a mortgage given to secure the purchase-money; suit to foreclose the mortgage.

Held, that the child sustained no substantial injury by the refusal of the court to permit such child to assert a claim, by way of cross complaint, to an interest in the land as heir, and have her title quieted.

Held, also, that the interest sought to be subjected to the foreclosure proceedings did not include the widow's interest in the land, but only such interest as passed under the administrator's sale.

Held, also, that if the order of the court had included the interest of the widow, such order would have been void.

From the Vanderburgh Circuit Court.

97	528
134	446
97	528
144	582
97	528
148	134
97	528
164	430

Wimberg *et al.* v. Schwegeman.

P. Maier and G. Palmer, for appellants.

J. S. Buchanan and C. Buchanan, for appellee.

ELLIOTT, C. J.—This suit was brought by the appellee against William and Elizabeth Wimberg to foreclose a mortgage. The questions in the case arise on counter-claims filed by Henry Wimberg and Mary Felthaus, and each counter-claim presents different questions. We shall first consider and dispose of the questions presented by the counter-claim of Wimberg.

The pleading of Wimberg alleges, in substance, that the mortgage was executed to secure the purchase-money of the land described in the mortgage; that it was conveyed to the cross complainant by the mortgagee, by a deed with full covenants; that the covenants were broken because the grantor was not lawfully seized, and had no right to convey two-thirds of the land and had only a life-estate in the other one-third, and did not and could not convey any greater estate, and that by reason of the breach he has sustained damages in the sum of \$1,000. There are two paragraphs, but they do not differ substantially, except in the prayer, the one praying judgment for damages and that they be counter-claimed against the purchase-money, and the other praying for an injunction.

There was no allegation that the grantee was evicted, or that he had surrendered possession to the owner of the paramount title, and for want of this allegation the first paragraph is fatally defective. Our cases have steadily maintained that where a deed is received and possession taken under it, payment of purchase-money can not be defeated without showing an eviction or surrender of possession. *Reasoner v. Edmundson*, 5 Ind. 393; *Small v. Reeves*, 14 Ind. 163; *Hacker v. Blake*, 17 Ind. 97; *Marvin v. Applegate*, 18 Ind. 425; *Estep v. Estep*, 23 Ind. 114; *Hanna v. Shields*, 34 Ind. 84; *Black v. Coan*, 48 Ind. 385; *Mahoney v. Robbins*, 49 Ind.

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146; *Jones v. Noe*, 71 Ind. 368; *Gibson v. Richart*, 83 Ind. 313, see p. 314. It is true that the breach of the covenant gave a right to nominal damages, but there are very many cases holding that a judgment can not be reversed for a failure to award nominal damages. This is expressly held in many of the cases cited, and is impliedly decided in all of them, as well as in *Platter v. City of Seymour*, 86 Ind. 323; *Axtel v. Chase*, 77 Ind. 74; *Town of Tipton v. Jones*, 77 Ind. 307; *Atkins v. VanBuren School Tp.*, 77 Ind. 447; *Patton v. Hamilton*, 12 Ind. 256.

The second paragraph of the counter-claim presents an essentially different question. Counsel for appellee dispose of it by citing *Strong v. Downing*, 34 Ind. 300, but that case, upon the point to which it is here cited, was expressly overruled in *Fehrle v. Turner*, 77 Ind. 530. The rule established by the case last cited is that an injunction may be maintained to restrain the collection of purchase-money in a proper case, but it is not decided that an injunction will lie in all cases where covenants are broken by a total failure of title. What constitutes a case for injunction is not defined; it is, however, held that there are cases where an injunction will lie. It is not every case where there is a total failure of title and a breach of covenant, that a grantee in possession can maintain a suit to restrain the collection of the purchase-money. In order to obtain relief by injunction, some facts showing an equity in the applicant must be stated.

We need not, and do not, decide just what facts must be alleged in order to entitle the grantee to an injunction; we do decide that one of the material facts that must appear is the insolvency of the grantor. If the grantor is solvent, then there is a full legal remedy upon the covenants, and, consequently, no reason for resorting to the extraordinary remedy of injunction. The cases are well agreed upon this point. *Miller v. Avery*, 2 Barb. Ch. 582; *Woodruff v. Bunce*, 9 Paige, 443; *Allen v. Thornton*, 51 Ga. 594; *Moore v. Hill*, 59 Ga. 760;

Wimberg *et al.* v. Schwegeⁿman.

Yonge v. McCormick, 6 Fla. 368; *McDunn v. City of Des Moines*, 34 Iowa, 467.

In holding that where insolvency is alleged, the grantee may restrain the collection of the purchase-money, we do not adopt a doctrine new to this court, for the principle upon which it rests was laid down long since in the cases of *Fitch v. Polke*, 7 Blackf. 564, *Addleman v. Mormon*, 7 Blackf. 31, *Buell v. Tate*, 7 Blackf. 55, *Arnold v. Curl*, 18 Ind. 339, see p. 341. These cases seem to have been overlooked in both *Strong v. Downing*, *supra*, and *Fehrle v. Turner*, *supra*, although they bear strongly upon the question, and one, at least, is directly in point.

In *Ricker v. Pratt*, 48 Ind. 73, the doctrine of the cases cited was approved, and it was held that the matter must be pleaded in the suit to foreclose the mortgage, and that it could not be afterwards set up in an independent suit for injunction. Confining ourselves to the point presented, we hold that the second paragraph of the counter-claim was bad, because it did not allege that the grantor was insolvent, and we have not examined to ascertain whether it is or is not defective in any other particular.

We now turn to the counter-claim of Mary Felthaus. In that pleading it is alleged that Nicholas Kapps died intestate, seized in fee of the land in controversy; that he left surviving him the cross complainant, his only child, and a childless second wife, Elizabeth Kapps, who is still living; that Nicholas Kapps died insolvent, and his administrator was ordered to sell, and did sell, to appellee "all the estate which said Nicholas Kapps had in said land liable to be sold for the payment of his debts, amounting to two-thirds of the fee, and no more;" that the administrator's deed purported to convey all of the land; that all of the land was described in the deed of appellee to Wimberg and in the mortgage which he executed to secure the purchase-money.

The contention of appellant's counsel is that Mary Felt-

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haus took a fee burdened by the life-estate of the second wife, and this contention is supported by a very learned argument, in which are cited, among others, the following authorities: *Martindale v. Martindale*, 10 Ind. 566; *Ogle v. Stoops*, 11 Ind. 380; *Rockhill v. Nelson*, 24 Ind. 422; *Louden v. James*, 31 Ind. 69; *Longlois v. Longlois*, 48 Ind. 60; *Russell v. Russell*, 48 Ind. 456; *Swain v. Hardin*, 64 Ind. 85; *Hendrix v. Sampson*, 70 Ind. 350; *Chisham v. Way*, 73 Ind. 362; 1 Pres. Est. 31; 1 Washb. R. P. (2d ed.) 64; 1 Cruise, 47.

In answer to this position the appellees' counsel assert that the second wife takes a fee which at her death descends to the cross complainant, and they cite *Armstrong v. Cavitt*, 78 Ind. 476; *Slack v. Thatcher*, 84 Ind. 418; *Hendrix v. McBeth*, 87 Ind. 287; *Flenner v. Benson*, 89 Ind. 108; *Flenner v. Travellers Ins. Co.*, 89 Ind. 164. We do not think it is necessary or proper for us to decide this question.

The suit to foreclose the mortgage was not against the cross complainant, and did not involve her interest in the land. The interest sought to be subjected to sale was such as the deed of the administrator conveyed, and this did not include the widow's interest in the land. If the order of sale had included the widow's interest, it would have been void, because beyond the power of the jurisdiction of the court. *Armstrong v. Cavitt*, *supra*; *Flenner v. Travellers Ins. Co.*, *supra*; *Nutter v. Hawkins*, 93 Ind. 260, see p. 264; *Pepper v. Zahnsinger*, 94 Ind. 88. The right asserted in the foreclosure suit did not affect the title of the cross complainant, and a decree could not have prejudiced her rights. We do not think any substantial injury was done in refusing to permit her to come in as a party and set up a claim which was not disputed. There was not the slightest necessity for her to set up title, for she was not made a party to the suit, nor was any interest owned by her claimed in that suit; all that was sought was a foreclosure of the mortgage as to the mortgagor's interest. Whatever may be the interest of Mary Felthaus, it exists unimpaired by the decree in the foreclo-

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sure suit, for that decree operates only upon the interest in the land sold by the administrator.

Judgment affirmed.

Filed Oct. 14, 1884.

No. 11,333.

GUERIN ET AL. v. KRANER.

SHERIFF'S SALE.—*Suit to Set Aside.—Complaint.—Schedule.—Exemption.—*

Resident Householders.—Sheriff.—Conduct at Sale.—A complaint to set aside a sheriff's sale of real estate, on the ground that it was exempt from execution, as the property of a resident householder, as provided by section 703, R. S. 1881, is fatally defective if it does not allege that the schedule required by sections 713 and 714, R. S. 1881, and which he delivered to the sheriff, contained a list of all his property at the date of the issuing of the writ.

SAME.—*Construction of Statute.—Substantial Compliance with Provisions by Officer.—Presumption.*—While statutes relating to exemptions must be liberally construed, a party claiming a specific remedy by reason of the denial of his right by an officer acting in discharge of his duty, must show that he has substantially complied with the provisions of the statute entitling him to claim the exemption; otherwise the presumption will be that the officer performed his duty.

SAME.—*Pleading.—Demurrer.*—Facts, not conclusions, should be averred in a pleading; an allegation in the complaint, that the plaintiff complied with all the statutory provisions entitling the property to exemption, without specific averments, is not sufficient.

SAME.—*Execution.—Service of Writ.—Averment of Property or Readiness to Pay.*—An averment in the complaint, that the sheriff did not serve the writ on the execution defendant, is not material, unless there be an allegation that he had other property, which he would have designated, and is still ready to turn out, or that he was prepared to pay the money on the writ.

SAME.—*Announcement at Sale.—Claim of Execution Defendant.*—An announcement by the sheriff at the sale, that whoever purchased the property would take it subject to a lawsuit by the execution defendant and subject to any claim he had upon it, was matter a prudent bidder would consider without such announcement, and would not avoid the sale.

From the Henry Circuit Court.

J. H. Mellett and E. H. Bundy, for appellants.

J. Brown and W. A. Brown, for appellee.

97	533
134	528
97	533
140	161
97	533
146	504

Guerin et al. v. Kraner.

HAMMOND, J.—Action by the appellee against the appellants to set aside a sheriff's sale of real estate. Appellants demurred to the complaint for want of facts, and their demurrer being overruled, they answered by the general denial. Trial by the court; finding and judgment for the appellee.

The appellee alleges, in her complaint, that she is the owner of certain described real estate; that appellant Guerin obtained judgment against her in the Henry Circuit Court; that he caused an execution to be issued on said judgment, and to be levied upon said real estate; that he purchased the real estate at sheriff's sale for \$120, and that after the expiration of the year for redemption he obtained a sheriff's deed. The sheriff was made a party defendant, and is one of the appellants. The grounds upon which the appellee asks to have the sale set aside are stated in her complaint as follows:

“The plaintiff further avers that the judgment upon which said execution was issued was rendered upon a cause of action founded upon contract, and that the plaintiff was, at the time of the rendition of said judgment, and always continued thereafter to be, a resident householder of the State of Indiana; that said real estate was at the date of said execution, and still is, of the value of \$700, and it was then and still is incumbered by mortgage in the sum of \$600; that she did not, at the time of the issuing of said execution, own more than \$280 worth of real and personal property, including the above described real estate, after deducting the said incumbrance; that she was entitled to have exempted and set off to her the real estate above described as exempt from said execution; that she made out and delivered to the sheriff a schedule of all of her real and personal estate within and without the State, which said schedule was duly verified in due form of law, and she selected an appraiser and demanded that said property be set off to her, or so much thereof as she was entitled to as such resident householder; that said schedule and inventory of property complied in all respects with the law making a schedule and inventory a condition

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precedent to the right to have property exempt from execution by resident householders; that said sheriff took said inventory and schedule and made no objection to the substance or form thereof, but disregarded his duties in that respect and sold said property to his co-defendant, and refused to pay the plaintiff any portion of the purchase-money, but paid the same over to the judgment plaintiff, and entirely disregarded the plaintiff's claim of exemption.

"The plaintiff further avers that the said sheriff never demanded any property of her, nor served said execution upon her. She further avers that the said sheriff and said Guerin, for the purpose of preventing said property from bringing more money, and for the purpose of preventing persons from becoming bidders at said sheriff's sale, announced and proclaimed at said sheriff's sale that whoever bought said property would take it subject to a lawsuit by the plaintiff, and would take it subject to whatever claim the plaintiff had, if she had any, thereon."

Before a debtor is entitled to the benefit of an exemption of his property from sale under execution, he must make out and deliver to the officer holding the execution a schedule of all property belonging to him, or in which he had an interest, at the date of the issuing of the writ, and make and subscribe an affidavit that the inventory contains a true and full account of all his property, had or held by him at the time the execution was issued; and until such schedule and affidavit are furnished, the officer must disregard the debtor's claim for exemption. Sections 713 and 714, R. S. 1881.

It will be observed that while the appellee's complaint alleges that she delivered to the officer a verified schedule of all her property, it does not state that it was all the property belonging to her at the date of the issuing of the execution. The inference would be that it was an inventory of the property owned by her at the date of furnishing the schedule. This date is not given, but it appears to have been subsequent to the time when the execution was issued. At all events, it

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does not appear that the schedule and affidavit were furnished on the date of issuing the writ. Statutes relating to exemptions must be liberally construed; at the same time, however, a party claiming a specific remedy, by reason of the denial of his rights under these statutes, must show that he has substantially complied with their provisions. His pleading must aver facts showing that he was entitled to the benefit of exemption; otherwise, it will be presumed that the officer, in denying his claim, performed his duty. *Berry v. Nichols*, 96 Ind 287. This question was considered in *Over v. Shannon*, 75 Ind. 352, which was an action to recover the possession of real estate purchased at sheriff's sale. The defendant answered, charging that his claim for exemption had been denied. This court held that the answer was bad for the reason, among others, that it did not aver that the schedule "contained a full account of all property held at the time the writ was issued." It was said in that case: "For aught that appears, the appellee may have been the owner of other property when the execution was issued, and, indeed, of other property exceeding in value three hundred dollars when the writ was levied."

Facts, not conclusions, should be averred in a pleading. 1 Works Pr. section 346. The allegation in the complaint, that the appellee complied with all the statutory provisions entitling her property to exemption, is a mere conclusion which does not in any way help the complaint.

We are next to consider whether the sheriff's sale was voidable on account of the officer not serving the execution upon the appellee. The statute seems to require such service before levying upon property. Section 719, R. S. 1881. The object of the service is to give the execution defendant an opportunity to pay the execution without incurring further costs, or the right to designate the property to be levied upon. Section 727, R. S. 1881. As the appellee's complaint does not aver that when the levy was made she was then and is still ready to pay the judgment, or that she had

Maddox, Administrator, v. Maddox *et al.*

property, other than that levied upon, which she would have designated, and which she is still ready to turn out upon the execution, it is difficult to see how she was harmed by the levy not having been preceded by service of the execution. The want of such service does not, under the facts stated in the complaint, vitiate the sale. Nor do the facts averred in the complaint show misconduct upon the part of the appellants that reasonably could have prevented others from bidding at the sale. The announcement made by them at the sale, that whoever purchased the property would take it subject to a lawsuit by the appellee, and subject to any claim she had upon it, was a matter that any prudent bidder would have considered without such announcement having been made.

The demurrer to the complaint should have been sustained.

Reversed with costs, with instruction to sustain the demurrer to the complaint.

Filed Oct. 15, 1884.

No. 11,677.

MADDOX, ADMINISTRATOR, v. MADDOX ET AL.

DECEDENTS' ESTATES.—*Claims Against.—Promissory Notes not Due.*—Under the 86th, 97th and 101st sections of the decedents' act of 1881, as amended by the act of March 7th, 1883, pp. 153, 155 and 156, promissory notes executed by the decedent, whether due or not, may be filed as claims against his estate.

SAME.—*Judgment.*—The judgment in such a case is a mere allowance of the claim to be paid in due course of administration. Acts 1883, p. 157, section 14, amending section 2328, R. S. 1881.

SAME.—*Form of Judgment.*—Where judgment was rendered against the estate, when it should have been against the administrator, under section 101, as amended, but no objection was taken to the form, or no motion made to correct it, the error will not be noticed on appeal.

ASSIGNMENT OF ERROR.—*Waiver.*—An assignment of error is waived by the failure of appellant's counsel to discuss the question.

From the Blackford Circuit Court.

W. H. Carroll and E. Pierce, for appellant.

Maddox, Administrator, v. Maddox *et al.*

BICKNELL, C. C.—This was a claim by an administrator against the estate of his decedent under sections 86, 97 and 101 of the decedents' act of 1881, as amended by the act of March 7th, 1883, Acts 1883, pp. 153, 155 and 156.

The claim consisted of two promissory notes made by the decedent, one of them payable to the administrator, the other payable to Sophia M. Maddox. Under the statutes aforesaid, such claims may be filed whether they are due or not, and these notes were not yet payable.

The court under section 97, *supra*, as amended, appointed an attorney to represent the estate, who answered by a general denial. There was a trial by the court with a finding for the claimant for \$690.39.

Section 101, *supra*, as amended, provides that, on a finding for the claimant, the court shall render judgment against the executor or administrator for the amount thereof and for costs in the proper cases, to be paid out of the assets of the estate to be administered.

The judgment in this case was rendered not against the administrator, but against the estate, for the amount of the finding and for costs, but there was no objection to the form of the judgment, and no motion was made to correct it.

The defendant moved for a new trial; this motion was overruled; the defendant appealed from the judgment.

The errors assigned are :

1. The complaint does not state facts sufficient to constitute a cause of action against the defendant in favor of the appellees jointly. This specification is waived by the failure of the appellant's counsel to discuss it in his brief.

2. The court erred in overruling the motion for a new trial.

The following are the reasons alleged for a new trial :

1. The finding is not sustained by sufficient evidence.

2. The finding is contrary to law.

3. The damages are excessive.

4. The court erred in the assessment of the amount of the recovery.

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The judgment in a case like this is a mere allowance of the claim, to be paid in due course of administration. Acts 1883, p. 157, sec. 14, amending section 2328, R. S. 1881.

The execution of the notes sued on was admitted on the trial, but the defendant insisted that they had been altered after execution. There was evidence, however, tending to show that the alterations were made by the decedent, on the same day the notes were executed and about the time they were signed.

The finding was sustained by the evidence; the damages were not excessive; there was no error in the assessment of the amount of recovery, and the finding was not contrary to law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Oct. 11, 1884.

No. 11,706.

BAKER ET AL. v. MERRIAM ET AL.

PRESUMPTION.—Public Officer.—The presumption is always in favor of that which is ordinarily and usually done in like cases. A public officer is presumed to have done his duty.

REPLEVIN BAIL.—Contract.—Terms.—Statutory Undertaking.—Effect.—Motives.—Where a contract is one made by the parties directly, then what all agree upon constitutes its terms, but where the statute gives a certain meaning and force to an undertaking, then that meaning and that force it possesses irrespective of the motives which prompted its execution.

SAME.—Reversal of Judgment Against one.—Release of Undertaking.—A party who becomes replevin bail upon an execution issued on a judgment against three defendants is released by the reversal of the judgment as to any one of the three judgment debtors.

SAME.—Judgment Confessed.—Principal and Surety.—A replevin bail, in legal effect, is similar in important features to a judgment confessed for all, and not merely for a part, of the principal debt. He becomes liable for all the defendants, and they all stand to him as principals to a surety. That the request was made by one for the bail is immaterial.

97	539
181	561
97	539
142	135
97	539
150	474

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SAME.—Lien.—Estoppel.—The replevin bail is so far concluded by the undertaking that it operates as a lien from the time it is entered into, and he is so far concluded that he can not, on his own account, attack the judgment.

SAME.—Parol Evidence.—Written Contract.—The undertaking of replevin bail can not be varied by parol evidence; it is a written contract, and is governed by the general rules applicable to other written contracts.

SAME.—Recovery of Money.—Restitution of Property.—The undertaking of replevin bail extends only to a recovery of money, and not to the order of restitution of property.

From the Cass Circuit Court.

D. P. Baldwin, M. Winfield and C. E. Taber, for appellants.

D. B. McConnell, for appellees.

ELLIOTT, C. J.—The material allegations of the appellees' complaint are these: That on the 10th day of December, 1879, Baker recovered judgment in the Cass Circuit Court for the possession of real estate and \$500 damages against Loyal Alford, Carrington Alford and Jackson Dobbins; that at the time the judgment was taken the Alfords were residents of Cass county, and Dobbins was a resident of White county; that the latter was solvent and the owner of property, and the former, the Alfords, were wholly insolvent; that Baker, after obtaining the judgment, and without seeking to enforce it against the Alfords, issued an execution to White county, and instructed the sheriff of that county to levy on the property of Dobbins; that the sheriff was proceeding to levy on the property of Dobbins, when he procured the appellees to become replevin bail; that they undertook, as replevin bail, solely at the request of Dobbins, to stay the execution as to him, and wholly relying upon his solvency; that after the appellees became replevin bail, Dobbins appealed from the judgment and secured a reversal, but did not file any bond nor obtain a supersedeas; that while the appeal was pending Dobbins died, and his estate was finally settled in due course of administration, and distribution to the heirs properly made; that after the reversal of the judgment Baker

took no proceedings in said cause, and it was struck from the docket. After this had been done he issued an execution against the appellees, and is attempting to enforce it by a sale of their property. The prayer is for an injunction restraining the sale of the appellees' property.

It is important to note that the complaint does not state the terms of the undertaking as bail. There is nothing indicating that it was not in the usual form, or that it did not possess the force annexed by law to undertakings of that character. Courts know, and parties know, from positive statute and from repeated decisions of this court, what the form and effect of such undertakings are. We must presume that the undertaking was in the usual form and possessed the usual force, since to do otherwise would be to presume that the sheriff and the bail had done an extraordinary thing, and this we could not do without violating a settled rule of law as well as logic, for the presumption always is in favor of that which is ordinarily and usually done in like cases. This presumption is here aided by another, namely, that a public officer is presumed to have done his duty.

The question is not on whose solvency the appellees relied, nor is it material that their motive was to favor one only of three judgment defendants. Motives are not consideration, nor are they elements of contracts or of judgments confessed. *Standley v. Northwestern, etc., Ins. Co.*, 95 Ind. 254. Where the contract is one made by the parties directly, then what all agree upon constitutes its terms, but where the statute gives a certain meaning and force to an undertaking, then that meaning and force it possesses irrespective of the motives which prompted its execution. There may be cases where the question of motive may be important as assisting in the construction of the contract or undertaking, but, granting that there are such cases, it is clear that this can not be one of them, for here there is nothing to invoke the assistance of extraneous circumstances; on the contrary, the undertaking is one with a fixed and definite legal meaning and force.

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Assuming, as we must, that the undertaking was the ordinary one of replevin bail executed to a sheriff upon an execution issued on a judgment against three defendants, the controlling question comes to this, was the bail released by the reversal of the judgment as to one of the three judgment debtors? The undertaking of the appellees, treated, as it must be, as an ordinary undertaking of bail, bound them to pay the judgment in case of the default of their principals, and bound them for the whole money judgment. Its legal effect was similar in important features to a judgment confessed, and to a judgment confessed for all, and not merely for a part, of the principal debt. *Maloney v. Newton*, 85 Ind. 565 (44 Am. R. 46); *Hutchins v. Hanna*, 8 Ind. 533; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Eberwine v. State, ex rel.*, 79 Ind. 266; *Sterne v. McKinney*, 79 Ind. 578; *Vincennes Nat'l Bank v. Cockrum*, 80 Ind. 355. In becoming bail in the usual way, the bail becomes liable for all the judgment defendants, and all of them stand to him in the relation of principals, he being the surety, clothed with the ordinary rights of a surety. *Vert v. Voss*, 74 Ind. 565; *Barlow v. Deibert*, 39 Ind. 16; *Hutchins v. Hanna, supra*; *Kane v. State, ex rel.*, 78 Ind. 103. The appellees became liable for all of the judgment debtors, as well as for all of the money part of the judgment. It is not material that one of the joint debtors made the request of them to enter bail, the undertaking was for all of the debtors; in other words, for the judgment debt just as it stood, both as to parties and amount. This was so held in *Ooon v. Welborn*, 83 Ind. 230, where it was said: "But the complaint in this case shows that replevin bail was entered upon the judgment, and the execution thereby stayed; and, notwithstanding the allegation that this was done without the consent of the appellee, it is not denied that it was done at the request of his co-defendants in the judgment; and it is plain that, if compelled to pay the judgment or any part of it, the replevin bail is entitled to recourse on the appellee as well as against those at whose request he signed." Our inquiry is by the principles

settled for us by these authorities narrowed to this, is the surety in an undertaking of a replevin bail for an entire judgment and for all of three judgment debtors bound in a case where the judgment is reversed as to one of the three? There is not a more familiar rule in the books than that a surety is entitled to stand upon the letter of his contract, and this rule, of course, extends to parties as well as to the terms of the contract. It has been again and again decided that if one of several principals for whom the surety stands is released, the surety's responsibility ceases. These are elementary principles, and there can be no doubt as to their existence and force; the only possible debate is as to whether they apply where one of several joint principals is released by a judgment of reversal. It is plain that when Dobbins was released the judgment ceased to be the one replevied by the appellees, for the judgment which they replevied was against three persons, whereas the release of Dobbins left a judgment against two persons. A judgment against two persons can not be the same as a judgment against three. It follows, with absolute logical precision, that the judgment which the appellants seek to enforce against the appellees is not the same judgment that they undertook to pay. The reversal terminated the existence of the judgment as to Dobbins, and though it was possible to secure a new judgment, it was not possible to revivify the old; for that there is no resurrection.

It would be inequitable to compel a surety to pay a debt adjudged to be owing by two persons only, when he had agreed to pay a debt for which three were bound. To hold a surety who undertakes for three or more persons to liability where the debt as to one of them is annulled by a judgment of a court, would often result in gross injustice. Suppose, for illustration, a man to undertake for ten persons and the judgment to be reversed as to nine, would it not be grossly unjust to make him stand for one when, at the time he contracted, he had a right to expect that there were ten principals to whom he might look for indemnity instead of one?

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In principle there is no difference between the case supposed and the actual case under investigation, for whether the principals released without the consent of the surety be one or nine does not change the legal principle. A rule so just in its operation, and so strongly grounded in principle, as that which protects a surety against the release of any one of the persons for whom he became liable, should never be impaired or weakened by limitation or restriction, unless the statute under which the undertaking of surety is entered into or the terms of the contract impose limitations and restrictions.

It is not the consent of the creditor that confers, as against the surety, the right to release one of several principals; that right can only be conferred by the surety's consent. It is not material to the surety's rights whether the creditor consented to the release or not, the material question is whether the surety consented. The creditor may or may not be willing to release the principal, but whether willing or unwilling, the release impairs the rights of the surety, and he may insist upon his discharge. A surety is just as much injured in a case where the judgment is reversed against the will of the creditor as he would be if the creditor had consented, for in either case a substantial right of the surety is swept away. The rule of which we are speaking is not made to punish the creditor, but to protect the surety, and protection to him requires that it be held that where one of the principals is released, with or without the consent of the creditor, the suretyship shall cease.

The general and almost universal rule is that a surety is entitled to be subrogated to the rights of the creditor against all of the principals, and this right can not exist where the creditor is adjudged to have no right at all against one of the principals, and this is the effect of the judgment of reversal, secured by Dobbins. The surety is discharged in all cases where he can not secure himself by paying the claim of the creditor and proceeding against all of the principals. *Boschert v. Brown*, 72 Pa. St. 372.

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The extinction of the liability of a principal extinguishes that of the surety, no matter how the liability is extinguished, so that it is not extinguished by the act of the surety. Whether the liability is extinguished by judgment of the court, or by other causes, the liability of the surety, which is but an incidental one, dies with it. *Gill v. Morris*, 11 Heisk. 614; S.C., 27 Am. R. 744; *Ames v. Maclay*, 14 Iowa, 281; *Middleton v. First National Bank*, 40 Iowa, 29; *Sage v. Strong*, 40 Wis. 575; *Brandt Suretyship*, section 121. There are exceptions to this rule, as, for instance, the case of an adjudication in bankruptcy discharging the principal debtor. *Ray v. Brenner*, 12 Kan. 105. The difference between cases of the class represented by the one cited and the present is apparent; in the former the judgment is not actually extinguished, but the debtor is discharged; in the latter the judgment is effectually extinguished. There is still another distinguishing feature. Parties in contracting assume that the law enters into their compact as a silent factor, and the surety assumes the risk of a discharge in bankruptcy, because, as the law, that enters into his undertaking; but it is absurd to say that a surety who undertakes to pay a judgment assumes to pay what the law subsequently declares through its representatives, the courts of the land, to be no judgment.

The principles to which we have referred make it clear, that unless there is something in the terms of the contract, or in the statute under which it is executed, the reversal of the judgment as to one of several defendants releases the replevin bail.

In the terms of the contract there is nothing changing the ordinary rules. Nothing in the language binds the replevin bail to pay a judgment which by the decision of the court becomes no judgment at all. No word can be found in the contract which binds the bail to pay a judgment made lifeless by the courts in due course of law.

The statute enters into the undertaking, and if that pro-

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vides that the bail shall be liable whether the judgment be annulled or not, then the surety can not escape. *Pence v. Armstrong*, 95 Ind. 191, see opinion, p. 206. It becomes important, therefore, to examine our statutory provisions. The provision of one section is, that "The undertaking in the recognizance shall be for the payment of the judgment, interest, and costs that may accrue at or before the expiration of the term of the stay of execution." Sec. 691, R. S. 1881. The effect of this provision is, clearly enough, to make the bail liable for the judgment and its incidents, and for that only. If liable for the judgment, and no other thing, then, when the judgment became extinct, there would be nothing for which the bail could be liable. If no judgment, then nothing binding the bail, for it is only the judgment that he undertakes to pay. If there were no other provision than this, there would not be the shadow of a doubt. Another section provides that the entry of replevin bail shall have the effect of a judgment confessed, but this provision does not substantially change the contract; it does not, at all events, make the bail liable where there is no judgment, and that fact is judicially determined on a direct appeal, for the existence of a judgment lies at the very foundation of his undertaking, gives it life, and supplies the measure of liability. The bail is so far concluded that the undertaking operates as a lien from the time it is entered into, and he is also so far concluded that he can not on his own account attack the judgment. But the right of appeal remains in the principal debtor; he may appeal, and it were a vain thing to grant him this right, and yet make it a barren one by holding that, even though it were sustained, still the judgment retained life and vigor. It has long stood as the law of this State that the entry of replevin bail does not bar the right of appeal. *Hyer v. Norton*, 26 Ind. 269. Our statute gives the general right of appeal, making only a single exception, and that is where the judgment has been paid in whole or in part. Prior to this statute, it was held that payment did not cut off the right of appeal, and surely courts can not deny

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what the law-making power has rightfully granted. It is clear that the right of appeal, with all its incidents and results, exists, and parties must be deemed to contract with reference to the law, and the judgment creditor must know that he can not make the bail pay a judgment extinguished by the court in due and legal form. He is bound by the law as it enters into and rules the undertaking. *Pence v. Armstrong, supra*. It is evident that the statute does not change the elementary rules which we have discussed.

Disastrous consequences would follow from the doctrine for which appellants contend. The right of appeal would be made fruitless in the face of a plain statute. The strange anomaly would be brought into existence of a surety being compelled to pay an apparent judgment declared by the highest court of the State to be no judgment. The right of subrogation, declared by many cases (see *Pence v. Armstrong, supra*, *Gerber v. Sharp*, 72 Ind. 553, and authorities cited), and upheld by the soundest principles of justice, would be overthrown, for if there was no judgment there would be nothing to which the surety could be subrogated. Our statutory provisions and our decisions would be thrown into hopeless confusion, and great injustice would be done. Strong reasons, therefore, combine to support our conclusion.

Two cases are cited by the appellants, but they are founded on a statute widely different from ours. In one of these cases, *Jones v. Bomberger*, 97 Pa. St. 432, the court said: "It will be observed that the act of 1845, defining the liability of bail for stay of execution, does not declare the bail shall be conditioned for the payment of the judgment, but for 'the debt or damages, interest and costs recovered.' * * It is a debt, the amount of which has been ascertained and fixed by the judgment, but it is nevertheless a debt. The obligation on the part of the bail is a contract to pay the debt which has thus been ascertained." Our statute, in unambiguous terms, confines the obligation of the bail to the judgment, and the reasoning of the court in the case cited shows that if that had been the

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provision of the statute before it, a different conclusion would have been reached. The other case, *Jones v. Raiguel*, 97 Pa. St. 437, is built upon the same statute, and is disposed of by what we have said. There is, however, another reason why it is not in point, and that reason is, that the effort to set aside the judgment was made by the bail, and not by the judgment debtor.

The case is not at all like that of the death of the principal. In such a case the judgment remains, and the bail may have subrogation. Here the judgment has ceased to exist; the reversal was its death.

We agree with appellants' counsel that an undertaking of replevin bail can not be varied by parol evidence. It is a written contract, and is governed by the general rules applicable to other written contracts. *Hopper v. Lucas*, 86 Ind. 43; *Smith v. Tyler*, 51 Ind. 512; *Jones v. Swift*, 94 Ind. 516, *vide* p. 521.

While we hold that the contract can not be varied by parol evidence, we do not find it necessary to decide whether there was or was not error in allowing the appellees to introduce the evidence which they claim tended to make out the equity of their case, because, conceding that the evidence was incompetent, still the case is one in which it is plain that no harm was done. No matter what the evidence was, the appellees were entitled to a recovery when they proved that the judgment replevied by the appellee had been annulled, for with the destruction of this judgment their liability terminated. This was the inevitable result, and laying aside the testimony objected to, the evidence was so strong as to shut out all doubt.

It is argued that the evidence does not make out a case, for the reason that it shows that in the judgment appealed from there was an order for the restitution of land, and that the judgment of reversal merely operated upon that part of the judgment which adjudged a recovery of \$500. The answer to this argument is, that the undertaking of replevin bail extended only to the recovery of money, and not to the order

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of restitution. This is so by the form of the contract and by force of the statute we have referred to. The appellees did not undertake to stay the operation of the order of restitution; they undertook to pay the judgment, and, as they stand as sureties, their obligation can not be extended beyond its letter. The statute does not provide that a stay may be entered in cases where possession of property is awarded, but provides that bail may be entered where the judgment is for "the sale of property or the recovery of money." A judgment awarding possession is neither for the sale of property nor for the recovery of money. In *Ensley v. McCorkle*, 74 Ind. 240, the judgment was for the sale of property, and that distinguishes that case from the present. But in that case the point decided was essentially different from any involved in this.

We have considered all the propositions argued by counsel, and find no material error in the proceedings and judgment of the trial court, and, therefore, affirm the judgment.

Filed Oct. 15, 1884.

 No. 11,460.

DANIELS ET AL. v. MCGINNIS, ADMINISTRATOR.

SUPREME COURT.—*Errors Waived.*—The Supreme Court will consider only the alleged errors discussed; all others are deemed waived.

QUIETING TITLE.—*Declarations of Grantor against Title of Grantee.*—*Conspiracy to Defraud.*—While, as a general rule, the declarations of a grantor made after he has parted with his title are not admissible in evidence to impeach the title of one claiming under him, yet, where the grantor and grantee have conspired together to defraud third persons, the statements of either are admissible against the other.

SAME.—*Evidence.*—*Declarations Prior to Proof of Conspiracy.*—Evidence of declarations only admissible on the ground of the existence of a conspiracy, if admitted before such proof is made, are rendered competent by the subsequent introduction of such evidence.

SAME.—The declarations of the grantor, made prior to the time that the grantor and grantee became actors in the conspiracy, are admissible in evidence against the title of grantee.

PRACTICE.—*Erroneous Instructions.*—*Harmless Error.*—Where it appears

97	549
132	26
133	265
97	549
136	240
97	549
137	521
97	549
140	496
142	404
143	334
97	549
145	168
146	193
146	635
97	549
152	431

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"that the merits of the cause have been fairly tried and determined in the court below," the judgment will not be reversed, although one or more of the instructions of the court to the jury may have been erroneous.

VERDICT.—*Construction.*—A verdict, however informal, is good if the court can understand it. Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity. If rendered upon substantial issues of fact, fairly presented by the pleadings, they should not be disturbed on account of mere technical defects.

JUDGMENT.—*Motion to Correct.* — *Practice.*—If a judgment is erroneous only in respect to the damages in the recovery of real estate, the motion should be to correct that part of the judgment, and not to vacate the entire judgment.

From the Superior Court of Marion County.

J. Buchanan, S. M. Shepard and C. Martindale, for appellants.

D. V. Burns and C. S. Denny, for appellee.

COLERICK, C.—This action was brought by the appellants against the appellee to quiet their title to certain real estate, situate in Marion county, Indiana. The appellee filed an answer of general denial to the complaint, and also a cross complaint against the appellants and one William Manke-dick, by which he sought to recover from them the possession of the real estate in dispute and damages for its alleged unlawful detention, and to quiet his title to the property. Joint and separate answers of general denial were filed to the cross complaint by the defendants thereto. The issues, so formed, were tried by a jury, who returned a verdict as follows: "We, the jury, find for the defendant, George F. McGinnis, administrator of the estate of Henry A. Hugo, deceased, against the plaintiffs, and against the defendants to his cross complaint, and also assess his damages against the plaintiffs at the sum of one hundred and fifty dollars (\$150). John H. Eagle, foreman." A joint motion by the appellants, and a separate motion by the appellant Charlotte S. Daniels, for a new trial, were overruled. A separate motion by Manke-dick for a new trial was sustained, and, thereupon, the cross complaint as to him was dismissed by the appellee. A judg-

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ment in favor of the appellee against the appellants for the possession of said real estate, and for \$150 as damages for its detention by them, and quieting his title thereto, was rendered. After the rendition of the judgment, a joint motion by the appellants, and a separate motion by the appellant Charlotte S. Daniels, to vacate and set aside the judgment so rendered, because it did not conform to the verdict, were overruled.

The only errors assigned by the appellants that have been discussed by them relate to the rulings of the court below in overruling their motions for a new trial, and to vacate and set aside the judgment.

Under the well settled practice of this court, we can only consider the alleged errors that have been discussed. Those not discussed are to be treated as abandoned or waived by the appellants.

The only causes assigned in support of the motion for a new trial, that are urged in this court, relate to the sufficiency of the evidence to sustain the verdict, and to the action of the court below in permitting the appellee to introduce in evidence, for the purpose of impeaching the appellants' title to the real estate in controversy, certain declarations of Mankedick, which were made subsequent to the execution by him of a deed of conveyance for the property, and under which deed the appellants claimed title, and to certain instructions that were given by the court to the jury.

The evidence clearly and strongly sustains the verdict. If it merely tended to do so, we could not, under the practice of this court, disturb the verdict on the weight of the evidence.

As a general rule the declarations of a grantor made after he has parted with his title are not admissible in evidence to impeach the title of any one claiming under him. *Campbell v. Coon*, 51 Ind. 76; *Garner v. Graves*, 54 Ind. 188; *Burkholder v. Casad*, 47 Ind. 418. There are exceptions to this rule. One of the exceptions is, where the grantor and grantee conspire together to defraud third persons. In such case the

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statement of either is admissible against the other. *Caldwell Williams*, 1 Ind. 405; *Tedrowe v. Esher*, 56 Ind. 443; *Kennedy v. Divine*, 77 Ind. 490; *Bump Fraud. Conv.* (2d ed.) 566. In *Wait on Fraudulent Conveyances*, section 280, it is said: "Where it is proved that the debtor and others have joined in a conspiracy to defraud creditors by a fraudulent disposition of property, the acts and declarations of either of the parties, made in the execution of the common purpose, and in aid of its fulfilment, are competent evidence against any of the parties." Under this exception to the rule the evidence complained of was offered and admitted. But it is insisted by the appellants that the court erred in admitting it, because, at the time of its admission, no proof had been made showing the formation or existence of a conspiracy for any such fraudulent purpose. It appears in the record that after the declarations were admitted evidence was introduced showing the existence of a conspiracy to defraud the creditors of Mankedick by a fraudulent disposition of the property in controversy, in which the appellants participated, and this proof rendered the declarations competent, and the error, if any was committed in first admitting the declarations in evidence, was thereby cured. See *Tedrowe v. Esher*, *supra*, in which the court below permitted the declarations of a conspirator to be given in evidence before the existence of the conspiracy had been established by proof. This court, in passing upon the question, said: "Still, if that evidence, when in, would sustain the ruling, it should not be held erroneous on appeal." The declarations were admissible in evidence against the appellants, although they may have been made prior to the time that the appellants became actors in the conspiracy. In *Bump on Fraudulent Conveyances* (2d ed.) 566, it is said: "It constitutes no objection to the admissibility of such declarations that the plan was concocted before the party against whom they are offered became an associate. By connecting himself with the others and aiding in the execution of their plan, he adopts their prior acts and declarations so far as they

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constitute a part of the *res gestæ*, as much as if he had been present and assented to each successive step in carrying out and consummating the fraud."

The rights of the appellants, so far as they were affected by the declarations of Mankedick, were carefully guarded by the court in its seventh instruction to the jury, in which it was stated: "I will say, however, in this connection, that the rule of law is that no admissions or declarations of Mankedick made after the date of his deed is admissible to defeat or affect plaintiffs' title under said deed, unless you further find that plaintiffs and Mankedick were conspiring together to consummate a fraud in reference to the title to the land. If the evidence is clear that such a conspiracy existed between these parties, then the admissions or declarations of Mankedick in regard to the matter are evidence against the plaintiffs. Whether or not such a conspiracy existed is also a question of fact for your decision from the evidence in the case other than the said statements of Mankedick; they can not be considered as evidence of the conspiracy, and are not evidence for any purpose until the conspiracy is established." No error was committed by the court in admitting the evidence.

We have fully and carefully examined the record, and all the evidence adduced at the trial, and find "that the merits of the cause have been fairly tried and determined in the court below," and hence we are precluded, by an express provision of the statute, R. S. 1881, section 658, from reversing the judgment, although one or more of the instructions of the court to the jury may have been erroneous, as asserted by the appellants. See *Toler v. Keiher*, 81 Ind. 383; *Simmon v. Larkin*, 82 Ind. 385; *Cassady v. Magher*, 85 Ind. 228; *Norris v. Casel*, 90 Ind. 143.

It is insisted by the appellants that the judgment which was rendered by the court did not conform to the verdict that was returned by the jury, in this, that it did not appear by the verdict that the damages which were assessed against the

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appellants, and for which judgment was rendered, were awarded on the cross complaint of the appellee. Unless they were so awarded, none could be assessed, as the issues which were formed on the complaint of the appellants did not involve the subject of damages, and under the issues so formed no affirmative relief could be granted to the appellee.

In Hilliard on New Trials (2d ed.), 133, it is said: "With regard to verdicts in general, it is held that a verdict, however informal, is good, if the court can understand it. Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided, unless from necessity. If rendered upon substantial issues of fact, fairly presented by the pleadings, they should not be disturbed on account of mere technical defects."

The views expressed by Mr. Hilliard are in harmony with the decisions of this court. See *Jones v. Julian*, 12 Ind. 274; *Mitchell v. Burch*, 36 Ind. 529. As we understand the verdict above set forth, the jury found in favor of the appellee on his cross complaint against all of the defendants thereto, but limited the assessment of damages thereon to the appellants alone, and it must have been, properly, so understood by the court below.

No error was committed in overruling the motion to vacate and set aside the judgment. If the judgment, in that respect, was incorrect, the appellants should have moved the court to modify the judgment, by vacating that part of it which related to damages, instead of assailing, as they did, the entire judgment, as it is conceded by the appellants, or not disputed by them, that in all other respects the judgment, in form, was in harmony with the verdict.

As there is no error in the record, the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellants.

Filed Oct. 16, 1884.

Doles v. The State.

No. 11,390.

DOLES v. THE STATE.

CRIMINAL LAW.—Sickness of Juror.—Discharge of Jury.—Jeopardy.—Constitutional Law.—The sickness of a juror, and his consequent inability to sit during the trial of the cause, is a sufficient cause for the discharge of the jury before the return of a verdict, and for the issue of a *venire de novo* at the same or a subsequent term; and, in such case, the defendant has not been in jeopardy, within the meaning of that word, as used in either the State or Federal Constitution.

SAME.—Murder.—Dying Declarations.—Preliminary Proof.—Discretion of Court.—Where the defendant is charged with murder, and the State, on the trial, proposes to put in evidence the dying declarations of the deceased, and, to that end, offers the necessary preliminary proof to show the court that the declarations were made by the deceased while in *extremis* and under a solemn sense of his impending dissolution, it is in the discretion of the trial court whether it will allow the State to introduce such preliminary proof in the presence and hearing of the jury, or will send the jury out during the introduction of such proof.

SAME.—Declarations of Defendant.—Res Gestæ.—The statements or declarations of the defendant, not made during but a short time after the transaction, in regard to the conduct of the deceased at the time, are not admissible in evidence as a part of the *res gestæ*.

SAME.—Dying Declarations.—Credibility and Weight.—The caution and care with which dying declarations should be received and scrutinized are questions for the trial court upon the preliminary proof; but when such declarations are received and admitted, their credibility and weight as evidence are the principal questions for the jury.

SAME.—Misconduct of Jury.—Bailiff's Presence in Jury Room.—Cause for New Trial.—Counter Affidavits.—Case Explained.—Ordinarily, the mere presence of the jury bailiff in the jury room during their deliberations upon their verdict, when shown by affidavit, is such misconduct of the jury as will constitute a good cause for granting a new trial; but where, in a criminal cause, such misconduct is so explained and qualified by counter affidavits as to show that the defendant was not injured or harmed thereby, and the trial court so decides, the Supreme Court will respect such decision, and will not reverse the judgment on account of such misconduct. *Rickard v. State*, 74 Ind. 275, explained.

From the Tipton Circuit Court.

D. Waugh, J. P. Kemp, R. B. Beauchamp and G. H. Gifford,
for appellant.

C. C. Shirley, Prosecuting Attorney, *J. W. Kern* and *J. A. Swoveland*, for the State.

97	555
132	233
133	233
97	555
145	673
147	379
97	555
152	230
97	555
154	640
97	555
160	310
97	555
167	233

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Howk, J.—In this case, an indictment was duly returned by the grand jury of Tipton county into the court below, wherein it was charged, in substance, that the appellant George Doles, on the 28th day of February, 1882, in Tipton county, “did then and there unlawfully, feloniously, wilfully, purposely, and with premeditated malice, unlawfully kill and murder James P. White, by then and there unlawfully, feloniously, purposely, wilfully, and with premeditated malice, cutting, stabbing and mortally wounding said James P. White with a knife, which he, said George Doles, then and there had and held, contrary to the form of the statute.”

Afterwards, at the November term, 1882, of the court below, upon the appellant's arraignment and plea of not guilty, the issues joined were tried by a jury, and a verdict was returned finding him guilty of voluntary manslaughter, and assessing his punishment at imprisonment in the State prison for the period of twenty-one years. Over his motions for a new trial and in arrest of judgment, the court rendered judgment against him, in accordance with the verdict.

Several errors are assigned by the appellant upon the record of this cause, but the questions discussed by his counsel, in argument, are such as are presented by and arise under the alleged error of the court in overruling his motion for a new trial. Regarding the other errors assigned as waived, we shall consider and decide in this opinion such questions only as the appellant's counsel have presented for decision, in their well considered brief of this cause.

Counsel consider together the questions presented by the first three causes for a new trial, in the appellant's motion therefor, which were, in substance, as follows: 1. Error of the court in excusing and discharging from the jury Andrew J. Hobbs, after the jury had been accepted and sworn to try the issues joined in the cause, over the appellant's objection; 2. Error of the court in discharging the entire panel or jury, after they had been accepted and sworn to try the issues in the cause, over the appellant's objection; and 3. Error of the

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court in causing another or second jury to be empanelled, over the appellant's objections, and in compelling him to go to trial before such jury on said charge, a second time, over his objections.

In reference to these causes for a new trial the appellant's counsel say: "We think the court erred in discharging the juror Hobbs over the appellant's objections, after the jury had been empanelled and sworn to try the cause; and the court erred in empanelling another jury, and in requiring the appellant to again enter upon his trial, having been once in jeopardy." It may well be doubted, as it seems to us, whether the action of the court thus complained of by the appellant constitutes any proper or sufficient cause for granting him a new trial. A motion by the appellant for his discharge, on the ground that he had once been in jeopardy for the offence charged, would have properly presented the question to the trial court for decision, and if such motion had been overruled the assignment of such ruling as error would have properly presented the question for our decision. But waiving this point, and conceding, without deciding, that the question is properly before us, we think that the action of the court complained of in the first three causes for a new trial is not shown by the record to have been erroneous.

It is shown by the bill of exceptions that after the jury had been accepted and sworn to try the cause, the juror Hobbs being one of the panel, and before any other step was taken in the cause, the court adjourned, and, with the consent of the parties, permitted the jury to separate, under its instructions, during the adjournment; that when the court convened again the juror Hobbs stated to the court that he was sick and unable to serve as a juror in the cause, and asked to be excused from serving on said jury; that, upon the evidence of the juror and his physician then heard, the court found, and was justified, we think, in finding, that the statements of such juror were true; and that thereupon the court, over the appellant's objections, discharged such juror and the entire panel

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from the further consideration of the cause. It was further shown by the bill of exceptions that the court immediately called the cause again for trial, and that the appellant at the time objected to being required again to answer the indictment and being again put upon his trial thereon, for the reason that he had once been put upon his trial and in jeopardy on said indictment, which objections were overruled by the court, and to this ruling the appellant excepted. The bill of exceptions further shows that thereupon a second jury was empanelled and sworn to try the issues in the cause, and that the appellant at the time objected to going to trial again upon said indictment, before such last empanelled jury, for the reason that he had already been put upon his trial and in jeopardy on said indictment, which objection the court overruled and compelled him to go to trial before said jury on said indictment, and to this ruling and action of the court he at the time excepted.

In section 14 of the Bill of Rights, in the Constitution of this State, it is declared that "No person shall be put in jeopardy twice for the same offence," and the same provision is found in article 5 of the amendments of the Federal Constitution. Section 29, R. S. 1881. If, therefore, it can be correctly said that the appellant, in the case in hand, was once in jeopardy at or before the discharge of the first jury, empanelled and sworn to try the issues in the case, then it must be held that the subsequent proceedings in the cause were had in palpable violation of the appellant's constitutional rights, and were consequently erroneous. The general rule is, no doubt, that the defendant in a criminal case is in jeopardy when the jury are properly empanelled and sworn to try the issues in the cause. Like other general rules, however, this one has its exceptions. Thus, in 1 Bishop Crim. Law, section 1032, it is said: "Sickness may come, unknown till it arrives. And if, while the cause is on trial, it falls on the judge or a juror or the prisoner, to interrupt the proceedings before verdict, this result shows that no jeopardy ex-

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isted in fact, though believed to exist; and the prisoner may be required to answer anew." See, also, 1 Bishop Crim. Procedure, section 948, where it is said that if, during a trial, a juror becomes too sick to proceed, the panel may be discharged and the cause retried before another jury at the same or a subsequent term. This court has recognized the doctrine that the sickness of a juror during the trial and before a verdict is a sufficient cause for discharging the jury, and that, upon such discharge, a *venire de novo* may be issued, and the defendant may be put on his trial anew, on the same indictment, at the same or a subsequent term. *Rulo v. State*, 19 Ind. 298; *Vanderkarr v. State*, 51 Ind. 91.

We are of opinion, therefore, that there is no error in the action of the court of which the appellant complains in his first three causes for a new trial.

Appellant's counsel next consider in argument the questions presented by the fourth, sixth and seventh causes assigned in the motion for a new trial. Counsel first insist, under these causes for a new trial, that the court below erred in permitting the State, over the appellant's objections, to introduce to the court, in the presence and hearing of the jury, its preliminary proof, for the purpose of showing that certain dying declarations, which the State proposed to put in evidence, were made by the deceased while *in extremis*, and under a solemn sense of his impending dissolution; in other words, it is claimed by counsel that this preliminary proof, which was addressed to the court alone, and was not intended for the ear of the jury, ought not to have been presented to the court in the hearing of the jury, because of its supposed injurious effect on the minds of the jurors as against the appellant. Counsel cite no authority in support of this claim, and we know of none; and while we think there would have been no impropriety in the court's sending the jury out during the introduction of the preliminary proof, yet its refusal so to do does not seem to us to have constituted such an error as would authorize or require the reversal of the judgment. The ob-

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jection of the appellant to the introduction of the preliminary proof in the hearing of the jury was addressed to the discretion of the trial court, and the action of the court in overruling the objection does not show such an abuse of its discretion as would constitute error.

Appellant's counsel also insist, under the eighth cause for a new trial, that the court erred in refusing to permit the appellant to show, by the testimony of the attending physicians, that at the time the dying declarations were made, the deceased was not *in extremis*. Upon this point the bill of exceptions states that the appellant "asked permission of the court to introduce Drs. Austin and Zeek, the attending physicians upon the deceased after his injury, and prove by them that deceased expressed an opinion to them, while they were in attendance upon him, after he had received his injury, that he would get well." This was the entire offer of the appellant, as shown by the record, and it will be readily seen that it does not sustain the point made in argument by his counsel. There was no offer made by the appellant, as far as the record shows, to prove by his attending physicians, or by any one else, that the deceased, at the time the dying declarations were made, was not *in extremis* nor under a solemn sense of impending dissolution. The court did not err in excluding the evidence actually offered by the appellant, as shown by the record, upon the point under consideration.

Under the tenth cause for a new trial the appellant's counsel claim that the court erred in refusing to allow appellant to show that immediately after the encounter, and while he was fleeing from the field, he said he "had just been waylaid by the deceased, etc." Upon this point the bill of exceptions states that the appellant offered to prove by the witness then on the stand, "that he saw George Doles about 10 o'clock of the night of the alleged homicide at the residence of his mother, about a mile and a quarter from the premises of White, from where Doles had just come, and that Doles in conversation, at his mother's, stated to James Bowlbys that

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he had just been waylaid by Perry White, and that he had hurt him, but hoped that he hadn't hurt him any worse than Perry had hurt him."

In discussing this point the appellant's counsel say: "This declaration was made at a time so closely connected and interwoven with the principal fact under investigation as to be hardly separable from it. It was a circumstance surrounding the principal fact, and was a part of the *res gestæ*." In *Jones v. State*, 71 Ind. 66, it was held by this court that statements made by the deceased, not contemporaneously with, but a few minutes after the transaction, as to who inflicted the injury, are not admissible as part of the *res gestæ*, and the length of time between the main fact and the statements can not be important, if such time elapsed as to make the statements, having regard to their form and substance, merely narrative. Surely, no more favorable rule than this can be applied in considering whether or not the statements or declarations of the defendant, in a criminal cause, are admissible in evidence as a part of the *res gestæ*. Applying this rule to the case in hand, we have no difficulty in reaching the conclusion that the court did not err in excluding from the jury the statement or declaration of the appellant offered in evidence. It was merely a narrative of a past transaction, and was not a part of the *res gestæ*.

The court gave the jury seventeen instructions, to each of which the appellant excepted, and he has assigned as cause for a new trial, that the court erred in giving the jury all these instructions. In argument, however, his counsel complain only of a part of one of the instructions, as follows: "Dying declarations derive their sanction, not from an oath, but from the solemn sense of impending death. They do not admit of the opportunity of a cross-examination, and should be weighed by the ordinary rules surrounding the admission of other evidence."

Of this part of an instruction, the appellant's counsel say:

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“ We do not believe that dying declarations should be weighed by the ordinary rules surrounding the admission of other evidence. These declarations were made by deceased, within an hour or so after the conflict, while his blood was hot with passion, and while surrounded by his friends naturally inclined to encourage him in any statements that would exonerate himself. We think the court ought to have said, such declarations should be cautiously received and carefully scrutinized.”

It does not appear from the record that the appellant asked the court to instruct the jury that dying declarations “should be cautiously received and carefully scrutinized.” Therefore, if such an instruction were conceded to be proper, the appellant could not complain here that such an instruction was not given. *Hodge v. State*, 85 Ind. 561; *Powers v. State*, 87 Ind. 144. The instruction of the court, of which appellant complains, is not very clearly expressed, but we think there is no such error in it as would authorize the reversal of the judgment. The caution and care with which dying declarations should be received and scrutinized seem to us to be questions for the court, upon the preliminary proofs; but when they are received and admitted, their credibility and weight are the principal questions for the jury.

The sixteenth cause for a new trial was “error, irregularity and misconduct of the jury trying the cause, in permitting Charles Jones, the bailiff in charge of said jury, to remain in their room and in their presence and hearing during their deliberation upon their verdict.” This cause for a new trial was supported by the affidavits of the appellant and the bailiff. The State also filed the counter-affidavit of the bailiff, giving the facts more fully and in detail in regard to the alleged misconduct, than in his other affidavit. In his counter-affidavit, the bailiff, Jones, stated, in substance, that he was the bailiff, who had charge of the jury in this case; that the jury retired to the jury-room about two o’clock P. M. of the 9th day of December, 1882, the same being Sat-

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urday; that after conducting the jury to their room, he did not remain therein during their deliberations, but went into such room occasionally during the afternoon and evening, only for the purpose of attending to the wants of the jury and keeping up fires; that at no time did he remain longer than was necessary for such purposes; that about seven o'clock P. M. of said day, by the order of the court, the jury were removed from the jury-room to the court-room, on account of the latter being more comfortable than the former room, the jury-room being at the top of the building, very small and poorly furnished, and the weather being then very cold; that after the jury were so removed to the court-room, the affiant locked said room and did not return until about nine o'clock on said night, except being in and out occasionally as the wants of the jury required, when he returned to the court-room where he replenished the stoves; that having no other place to remain about said building he sat down in the court-room apart from the jurors, and said and did nothing to any of them about their deliberations; that after so sitting a short time, he laid down on a table and went to sleep, and slept until he was awakened by a juror, about eleven o'clock on said night, and requested to go to the residence of the judge and bring him to the court-room to receive their verdict; that at no time did the affiant speak to the jury or any member thereof, concerning the matters upon which they were deliberating, except as to whether they had agreed, or as to the probability of an early agreement; nor did he, in any manner, influence or attempt to influence them; but that his presence in said room, as he believed, was necessary in the discharge of his duties, and that he only tried to discharge his duty as bailiff, according to law; and that, by no word or act of the affiant, was the defendant in any wise injured, as he believed.

In *Rickard v. State*, 74 Ind. 275, it was held, substantially, that the mere presence of the bailiff of a jury in their room during their deliberation would vitiate their verdict. In the

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opinion of the court in that case some stress is placed upon the fact that "the State introduced no evidence contradicting, explaining or qualifying" the alleged misconduct of the jury in permitting their bailiff to be present in their room while they were deliberating upon their verdict. In the case in hand, however, the State introduced as evidence the counter-affidavit of the bailiff, the substance of which we have given, for the manifest purpose of explaining and qualifying the alleged misconduct of the jury. The question for decision here may be thus stated: Does the evidence introduced by the State sufficiently show that the appellant was not injured or harmed by the misconduct of the jury of which he complains? We are of opinion that this question must be answered in the affirmative. The trial court must have found, and was justified in finding, that the presence of the bailiff of the jury in their room during their deliberations was necessary to the proper discharge of his duties as bailiff, and did not injure or harm the appellant in any manner. Upon such a question the court decides, as we have often held, upon the preponderance of the evidence, as in civil cases. *Holloway v. State*, 53 Ind. 554; *DePriest v. State, ex rel.*, 68 Ind. 569; *Weaver v. State*, 83 Ind. 289. The decision of the trial court upon such a question will not be disturbed by this court upon the weight of the evidence.

The only other ground upon which the appellant claims that the court erred in refusing him a new trial, was the alleged insufficiency of the evidence to sustain the verdict. We can not disturb the verdict on the evidence. There was some conflict, it is true, in the evidence, but there is an abundance of evidence in the record to sustain the verdict on every material point. The credibility of the witnesses, and the weight of their testimony, were questions for the jury and the trial court. Where there is a conflict in the testimony of the different witnesses which can not be reconciled, the jury have the right, and it is their province and duty, to determine which of the witnesses are the more worthy of belief. When the

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verdict of the jury has met the approval of the trial court, it will not be disturbed by this court upon the question solely of the weight or sufficiency of the evidence. This rule and the reasons for it have often been declared in the decisions of this court. *Cox v. State*, 49 Ind. 568; *Hayden v. Cretcher*, 75 Ind. 108; *Cornelius v. Coughlin*, 86 Ind. 461.

Upon the whole case, we are of opinion that the court did not err in overruling the appellant's motion for a new trial.

The judgment is affirmed, with costs.

Filed Oct. 11, 1884.

No. 10,235.

LANCASTER ET AL. v. DUHADWAY, AUDITOR, ET AL.

TAXES.—*Complaint to Set Aside Sale.*—*Tender.*—A complaint to set aside a sale of land for taxes, and to cancel the certificate of purchase, on the ground that the plaintiffs have tendered the amount of the taxes and the interest thereon to the purchaser, is insufficient upon demurrer, unless the plaintiffs also bring the money into court, or offer to pay it to the purchaser upon obtaining the relief demanded.

SAME.—*Deed.*—*County Auditor.*—*Injunction.*—*Legal Disability.*—*Infant.*—The auditor of the county has authority to execute a conveyance of land sold for taxes, at the expiration of two years from the time such sale was made, though such lands belong to persons under disabilities, and, therefore, he can not be enjoined from executing such deed unless the lands are redeemed from such sale.

From the Wayne Circuit Court.

J. W. Newman, for appellants.

C. H. Burchenal, for appellees.

BEST, C.—The appellants, who are minors, brought this action by their next friend, against Caleb S. DuHadway, auditor of Wayne county, and Almeron F. Chapin, who had purchased the appellants' land for taxes, to cancel the certificate of purchase and to enjoin the execution of a deed.

The complaint consisted of two paragraphs, each of which averred, in substance, that the appellants owned the land de-

97	565
126	126
126	333
97	565
129	148
97	565
139	290
139	488
97	565
142	94
143	48
143	82
97	545
161	390

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scribed ; that said auditor, on the 12th day of February, 1880, sold said land to said Chapin at a tax sale for \$91.57, the full amount of taxes due thereon, and issued to him a certificate of purchase ; that said Chapin has not, since that time, paid any taxes thereon, and that the appellants, on the 24th day of October, 1881, tendered to the treasurer of said county, and to said Chapin, \$105.31, the amount mentioned in said certificate, with fifteen per cent. interest thereon, in redemption of said property, but that each of them refused to receive the money so tendered ; that said auditor threatens to execute to said Chapin a deed of said land at the expiration of two years from the date of said sale, and that the same will create a cloud upon their title, etc. Wherefore, etc.

●A demurrer, for the want of facts, was sustained to each paragraph of the complaint, and, the appellants declining to further plead, final judgment was rendered against them. The ruling upon the demurrer is assigned as error.

The appellee insists that the complaint was insufficient, because the appellants do not aver that they bring the money tendered into court for him, or offer to pay it upon obtaining the relief demanded. This objection is well taken. The complaint is an application to a court of equity to cancel a certificate of purchase and to enjoin the auditor from executing a deed to the purchaser. This invokes the equitable aid of the court, and it is well settled that a court of equity will not extend its aid to a party who does not himself do equity. *Harrison v. Haas*, 25 Ind. 281 ; *Jones v. Sumner*, 27 Ind. 510 ; *McWhinney v. Brinker*, 64 Ind. 360.

This rule requires a party who seeks the equitable aid of a court, in order to protect himself against his adversary in such case as this, to bring the money due him into court, so that he can take it when the relief is granted. The tender of the money does not pay the debt, and if the relief were granted without requiring its payment, the court would deprive the purchaser of his only protection by destroying the muni-

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ments of his title while the money due him remains unpaid. This a court of equity will not do.

The appellants concede this rule in all applications to redeem real estate sold for the enforcement of liens, but they maintain that this suit is not such application. They insist that the tender of the amount of money due and the refusal of the purchaser to accept it operated as a redemption of the property, and as the property by such tender and refusal has already been redeemed, this is not an application for such purpose, but solely for the purpose of cancelling the certificate of purchase and of enjoining the execution of the deed. If the tender and its refusal thus operated, the result in this case is the same. The money due is not paid. Though it was tendered, and its payment refused, it still remains unpaid, and so long as it remains unpaid, and the appellants do not offer to pay, a court of equity will not assist them. If this is nothing more than an application to cancel the certificate and to enjoin the execution of the deed, still the application is to a court of equity to obtain its aid in order to prevent the purchaser from enforcing his claim through these muniments of his title. It is therefore immaterial whether the complaint is regarded as a bill to redeem or to cancel the certificate and enjoin the execution of the deed. In either case the same principle is involved, and the same rules control. *Cowles v. Marble*, 37 Mich. 158.

If the appellee were attempting to enforce his claim in any way, an answer, that the full amount due him had been tendered to him and had been refused by him, would probably bar his claim as such tender, and refusal would divest his lien, and in this sense would operate as a redemption of the property. *Moynahan v. Moore*, 9 Mich. 9; *Caruthers v. Humphrey*, 12 Mich. 270; *Dean v. City of Madison*, 9 Wis. 402; *Loomis v. Pingree*, 43 Maine, 299; *Kortright v. Cady*, 21 N. Y. 343, 366.

The appellee, however, is not attempting to enforce his

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lien, and therefore the rule announced in the above cases has no application in this case.

It is also insisted that the amount of money tendered was not sufficient to redeem the property, as fifteen per cent. interest was less than the appellants were required to pay, as they did not offer to redeem their property within six months from the time it was sold.

This question does not now necessarily arise, as the complaint is insufficient, whether they did or did not tender enough. When the appellee seeks to enforce his claim, the question may then arise, and if it does it can then be decided.

The complaint, for the reasons given, was insufficient, and as the demurrer was properly sustained the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellants' costs.

Filed Feb. 22, 1884.

ON PETITION FOR A REHEARING.

BEST, C.—The appellants, in support of their petition for a rehearing, insist that a county auditor has no authority to execute a deed for the lands of an infant sold for taxes, until the expiration of two years from the time such infant attains full age, and, as such deed will create a cloud upon the title, the complaint in this case was sufficient to enjoin the execution of such deed.

The statute provides that the owner of any lands sold for taxes may redeem the same at any time within two years from the last day of sale, and if no person redeems the same within said time, the auditor of the county in which such sale took place, at the expiration of such time, upon the production of the certificate of purchase, shall execute a conveyance of such real estate to the purchaser, his heirs or assigns. 1 R. S. 1876, pp. 121, 122, sections 208 and 222.

These sections of the statute are general, and apply alike

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to all persons and to all sales. The first section enables all persons, whether laboring under disabilities or not, to redeem from such sales within two years, and the last requires the auditor to execute a deed, at the expiration of such time, for all land sold for taxes, notwithstanding the fact that the owner may be an infant.

It is true, that such persons are not required to redeem within such time, but may do so at any time within two years after the removal of their disability. 1 R. S. 1876, p. 121, section 210.

The right to redeem may be exercised by such persons after the execution of a deed, and as the statute requires the auditor to make a deed for all lands after the expiration of two years from the sale, the mere fact that some persons may thereafter redeem does not deprive the auditor of the power to make the deed. The statute applies alike to all sales and makes no other provision for the conveyance of lands owned by persons under disabilities. No exception in favor of such persons is created by the statute and none can be by construction. Aside from this the auditor has no means of determining whether the owner of a given parcel of land sold for taxes is under disability, or when such disability ceases to exist. These are questions of fact not disclosed by the record and can only be determined by extrinsic testimony. Nor does the statute confer any authority upon him to determine them. It simply requires him to execute a conveyance to the purchaser, his heirs and assigns, after the expiration of two years from the last day of sale upon the production of the certificate, and, as this requirement embraces all sales, it necessarily includes the conveyance of lands owned by persons under disabilities. If so, the auditor can not be enjoined from the execution of a deed of conveyance unless the lands are redeemed from such sale. This may be done, and if the owner does not choose to do so within two years, he can not invoke the aid of a court of equity to enjoin the auditor from discharging a duty imposed upon him by a

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plain requirement of the statute. This is no hardship, as the right to redeem against all persons claiming through such sale is unaffected by such conveyance.

In *Ethel v. Batchelder*, 90 Ind. 520, a case where a married woman, whose land had been sold and conveyed for the non-payment of taxes, sought to quiet her title on the ground that the rents and profits received by the purchaser, who was in possession, exceeded the taxes, interest and penalties, it was incidentally said that the deed executed during coverture was improvidently issued, but as the decision did not turn upon such point, and as the conclusion reached is in entire harmony with the conclusion here reached, that case can not be deemed in conflict with this one. The petition should, therefore, be overruled.

PER CURIAM. —The petition is overruled.

Filed Nov. 13, 1884.

No. 10,435.

HIBBITS v. JACK ET AL.

WILL.—*Bequest to Wife.*—*Limitation.*—*Restraint of Marriage.*—*Descents.*—*Heirs.*—*Statute Construed.*—A devise of lands to the testator's wife "so long as she shall remain my widow" contains no condition in restraint of marriage, within the meaning of section 2567, R. S. 1881, but a mere limitation, and if she marry, or, not marrying, dies, the land goes to the heirs in the absence of a devise over.

STARE DECISIS.—*Overruled Cases.*—A decision of the Supreme Court afterwards overruled is not a general rule of property even as to purchases made on the faith of it before it was overruled. It is only the law of that case binding the parties to it, and those claiming under them, as to the matters involved in that suit.

From the Delaware Circuit Court.

J. S. Buckles and *J. W. Ryan*, for appellant.

O. T. Boaz, *W. W. Herod* and *F. Winter*, for appellees.

NIBLACK, J.—In his lifetime, and at the time of his death, as hereinafter stated, John Jack was, in addition to a consid-

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erable amount of other property, both real and personal, the owner of one undivided third part of a tract of land in Delaware county, estimated to contain sixty-five acres, upon which a flouring mill and its appurtenances were situate.

On the 27th day of September, 1859, the said Jack executed and published his last will and testament, which contained, amongst others, the following provision:

“ I hereby give, devise and bequeath to my beloved wife, *so long as she shall remain my widow*, all of my goods, chattels, rights, credits, moneys and effects, of every kind and character whatever, and all of my right, claim and interest of, in and to any and all real estate, wherever situated, of which I am or may be at any time seized or possessed, which may remain after payment of all my just debts.”

Early in the month of October then next ensuing, Jack died, leaving his will, so executed and published, in full force, and Susan Jack, as his widow, and Emily E. Jack, since intermarried with Edward H. Valentine, Martha M. Jack, since intermarried with William L. Little, Parmelia R. Gilbert, Mary E. Wood and Florence T. Jack, since intermarried with James E. Howe, as his only children, surviving him.

The will was, in a few days thereafter, duly admitted to probate, and the widow elected to take under that instrument instead of under the statute.

The widow, also, went immediately into the possession of her late husband's one undivided third part of the mill and its appurtenances under the will, and so continued until the 16th day of July, 1874, when she sold, and, by warranty deed, conveyed said undivided third part of the mill tract of land, with the appurtenances, to Wallace Hibbits, the appellant herein, for the sum of \$9,000. The sale and conveyance were made as above upon the theory that the devise of the real estate, herein above set out, was in restraint of marriage, and consequently void, and that it had, in legal effect, been so held in the case of *Spurgeon v. Scheible*, 43 Ind. 216, which had then but recently been decided, and that, in

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consequence, she, as widow, was the owner in fee simple of the real estate devised to her by the will.

Hibbits went into possession of the property thus sold and conveyed to him, claiming to be the owner in fee simple, and so remains in possession, having in the meantime made valuable improvements thereon. The widow still survives, and has never remarried.

This was a suit by Hibbits against the widow and children of John Jack, and the surviving husbands of such children, to quiet his title to the mill property so purchased by him, alleging that the defendants, other than the widow, claim to be the owners in fee simple of such property, and that they will be entitled to succeed to, and to enter into the possession of, the same after the death of the said widow, thus casting a cloud upon his title.

It is unnecessary that we shall notice all the pleadings and the proceedings upon each particular pleading. It is sufficient to state that the defendants, other than the widow, filed a cross complaint, substantially repeating the historical facts of the case contained in the complaint, alleging that the claim of Hibbits was a cloud upon their title, demanding that their title be quieted, and making Hibbits and the widow defendants to the cross complaint. Hibbits, answering the cross complaint, averred that at the time he purchased the interest in the mill property in controversy, it had been held by this court that devises to the widow of a testator, precisely similar to the one involved in this case, conferred an estate in fee simple upon the devisee, and that this construction of such devises had been adopted by all the courts, and accepted and acted upon by all the citizens of this State; that it was consequently understood and believed by him that Susan Jack, the widow, was seized in fee simple of the real estate devised to her by her husband, and that the plaintiffs, in the cross complaint, acquiesced in that construction of their ancestor's will. Wherefore it was claimed that the plaintiffs, in the

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cross complaint, were estopped from asserting any claim of title to the property in dispute.

The circuit court sustained a demurrer to this answer, and the appellant declining to plead further, final judgment was rendered against him upon the cross complaint.

This and other rulings upon the pleadings present the questions: *First*. What estate did Susan Jack take under her late husband's will? *Second*. If only an estate during widowhood, then were her co-defendants below estopped from asserting any claim of title to the property conveyed by her to the appellant?

The last clause of section 2 of the act concerning wills, approved May 31st, 1852 (2 R. S. 1876, p. 571), which has ever since been in force (R. S. 1881, section 2567), reads as follows: "A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void."

Counsel for the appellant, with much ingenuity, as well as elaboration and ability, argue that the devise of real estate to Susan Jack, now before us, was in its very nature, and in its practical effect continues to be, a restraint upon marriage, notwithstanding some decisions of this court in analogous cases seemingly to the contrary, and the conclusion reached in the case of *Spurgeon v. Scheible, supra*, affords a precedent which ought to be followed, and which, in any event, must be considered as having entered into and become a part of the law of this case.

Whether the terms used in a devise or bequest ought to be considered words of limitation only, or really words of condition, within the meaning usually attached to that phrase, constitutes often a very difficult question for decision. For that reason many of the cases intended to illustrate the difference between words of limitation on the one hand, and words of condition on the other, are obscure, and sometimes apparently capricious and arbitrary. This results from the ever varying phraseology employed in making devises and

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bequests. But when questions involving that difference arise, the courts must decide them as best they can, having reference to established precedents and the fair meaning of the words to be construed, when taken in connection with the other parts of the will.

As illustrative of the difference in question, Sir William Blackstone states the rule to be as follows:

“If an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtain a benefice, the respective estates are absolutely determined and gone.” 2 Bl. Com. 121.

And, continuing, at another place, says:

“A distinction is, however, made between a *condition in deed* and a *limitation*, which Littleton denominates also a *condition in law*. For, when an estate is so expressly confined and limited by the words of its creation, that it can not endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*; as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l*, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns, take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate.” Vol. 2, p. 155.

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In 2 Bouvier's Institutes, p. 272, section 1811, the same distinction is thus illustrated: "There is a marked difference between a condition and limitation, which should be remembered. A condition is a provision respecting a future and uncertain event, on the existence or non-existence of which is made to depend, either the accomplishment, the modification, or the rescission of a contract or testamentary disposition. In such case the estate or thing is granted or given absolutely, without limitation, but the title to it is subject to be divested by the happening or not happening of an uncertain event. For example, a man may give an estate to his wife, provided she shall continue to reside on it; or he may give it to her upon condition that she shall not marry.

"The first of these conditions is lawful, and if she remove from the premises she may forfeit the estate; but the last being in restraint of marriage is void, and the wife shall take the estate unconditionally.

"When, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally, with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation; as, if the estate is given *while*, or *as long as*, a woman shall remain a widow, or *until* she shall marry, the estate being given to her only during the time of her widowhood, and no longer, it determines by her marriage, and all her right to it is gone."

In 2 Washburn on Real Property, 4th edition, page 25, section 28, it is said: "The only general rule, perhaps, in determining whether words are words of condition or of limitation, is that, where they circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of limitation; when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition."

Tiedeman on Real Property, at section 281, says: "An es-

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tate upon limitation is one which is made to determine absolutely upon the happening of some future event as an estate to A., so long as she remained a widow. The technical words, generally used to create a limitation, are conjunctions relating to time, such as *during, while, so long as, until, etc.*"

In 2 Jarman on Wills, 566, the rule concerning limitations is thus stated: "But a bequest during celibacy is good; for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage. This is not a subtlety of our law only: the civil law made the same distinction. And no gift over is required to make the restriction in this form effectual."

The item of the will of Harmon, particularly considered by this court in the case of *Harmon v. Brown*, 58 Ind. 207, to which frequent reference has been made by counsel on both sides, was in the following words:

"First, I give and bequeath unto my beloved wife, Penina, during her widowhood, all my real and personal estate, to be held and freely possessed and enjoyed during her widowhood."

The widow, some years after the death of the testator, intermarried with one Brown, and the court below, in that case, held in effect that the item of the will set out contained words of condition in restraint of marriage, and gave judgment accordingly. This court reversed the judgment, holding that the words used in the item were words of limitation, and not of condition, and expressly overruled the case of *Spurgeon v. Scheible, supra*, to which reference has been made in so far as it seemingly recognized or established a different rule of construction. This case of *Harmon v. Brown, supra*, has either been cited approvingly, or expressly followed, by this court in the cases of *Coon v. Bean*, 69 Ind. 474; *Stilwell v. Knapper*, 69 Ind. 558 (35 Am. R. 240); *Brown v. Harmon*, 73 Ind. 412; *Tate v. McLain*, 74 Ind. 493; *O'Harrow v. Whitney*, 85 Ind. 140.

The case of *Harmon v. Brown, supra*, followed the construction inferentially approved in the much older case of

Rumsey v. Durham, 5 Ind. 71, to which no reference is made in *Spurgeon v. Scheible*, *supra*, and was, as it still is, supported by the prevailing, and, as it seems to us, unquestionable weight of authority. *Coppage v. Alexander*, 2 B. Mon. 313; *Vance v. Campbell*, 1 Dana, 230; *Rodgers v. Rodgers*, 7 Watts, 15; *Doyal v. Smith*, 28 Ga. 262; *Pringle v. Dunkley*, 14 Sm. & M. 16; *Hawkins v. Skeggs*, 10 Humph. 30; *Chapin v. Marvin*, 12 Wend. 538; *Beekman v. Hudson*, 20 Wend. 53.

In the case of *O'Harrow v. Whitney*, *supra*, this court held that where a husband dies, leaving a wife and two children surviving him, having first devised his land to his wife during widowhood, and she elects to accept the provision made for her by the will, her estate is limited in duration to the period of her widowhood, and that a purchaser, through a mortgage executed by the widow after a subsequent marriage, acquires no title to any part of the land. To that doctrine this court, as has been seen, is committed by a series of cases, and in the light of the authorities herein cited, and of others to which our attention has been called, from that doctrine we ought not to, and hence can not now, recede.

Our conclusion, therefore, necessarily is, that the words used in the devise before us in this case, were words of limitation merely, and not of condition in restraint of marriage, and that, in consequence, the estate which Susan Jack took in the lands devised to her will not extend beyond the expiration of her term of widowhood.

In behalf of the position assumed by counsel for the appellant, that the decision in the case of *Spurgeon v. Scheible*, *supra*, became a rule of property, and, in that way, a part of the law of this case, they cite the following cases: *Ohio, etc., Company v. Debolt*, 16 How. 416; *City v. Lamson*, 9 Wall. 477; *Olcott v. Supervisors*, 16 Wall. 678; *Rowan v. Runnels*, 5 How. 134; *Havemeyer v. Iowa Co.*, 3 Wall. 294; *Thompson v. Lee Co.*, 3 Wall. 327; *Larned v. Burlington*, 4 Wall.

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275; *Harris v. Jex*, 55 N. Y. 421 (14 Am. R. 285); *Robb v. Irwin*, 15 Ohio, 689, 703; and *Menges v. Dentler*, 33 Pa. St. 495.

But, as a careful examination will disclose, none of those cases have any practical analogy to the case at bar, resting, as does each one of them, upon an essentially different state of facts, and having reference altogether to other kinds and classes of property.

The doctrine of *stare decisis* can not be carried to the extent claimed for it in this case. The decisions of courts are not the law. They are only the evidence of the law, and this evidence is stronger or weaker according to the number and uniformity of adjudications, the unanimity or dissensions of the judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed. *Hart v. Burnett*, 15 Cal. 530.

Stare decisis does not mean adherence to the last decision of a court when so to adhere would be a desertion of the ancient and established law, and the principles underlying titles to real estate must rest upon a better and more stable basis than an erroneous judgment of a court.

A single decision, never called in question, but consistently acted on and generally acquiesced in for a series of years, may constitute a rule of property. While a line or very considerable number of interrupted and conflicting decisions do not.

Courts can not, with propriety, perpetuate an erroneous decision, nor even a series of erroneous decisions, unless such decisions have become a recognized and well settled rule of property which the public interest requires shall not be disturbed. Whether a particular case or line of cases shall be overruled is always a question resting in the sound discretion of the court, to be decided with reference to the public welfare, and not to any merely private interest. *Hart v. Burnett, supra.*

The mere overruling of the principles announced in a

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given cause does not disturb property rights which have become vested under it. What was decided by a case afterwards overruled, continues to be the law of that case, as between the parties and those claiming under them. *Hardigree v. Mitchum*, 51 Ala. 151; Wells Res Adjudicata and Stare Decisis, section 628.

Applying the several principles herein above enunciated to the case before us, the inference is evident that the case of *Spurgeon v. Scheible*, *supra*, never became either a rule of property or a precedent of binding authority in any subsequent case. The property rights of the parties to that case, and of those acquiring interests under them, remain intact, but as to all other persons a different rule of construction in similar cases has both previously and subsequently prevailed, and must still be applied.

If the appellant was in fact misled by the case of *Spurgeon v. Scheible*, *supra*, it is a misfortune to be most sincerely regretted, but, upon the facts stated in the pleadings, he is without remedy in this action.

The judgment is affirmed, with costs.

Filed Oct. 11, 1884.

No. 11,898.

MURPHY v. THE STATE.

CRIMINAL LAW.—Severity of Punishment.—Constitutional Law.—Supreme Court.

—Where the punishment assessed against the defendant, in a criminal cause, seems excessive and oppressive, yet, if it be within the limits prescribed by the statute, the apparent severity of the judgment affords the Supreme Court no legal or sufficient ground for disturbing the finding or reversing the judgment of the trial court.

SAME.—Evidence.—Unless the record shows an absolute failure of evidence to sustain the finding or verdict on some material point, the Supreme Court is not justified, even in a criminal cause, in reversing the judgment upon the weight of the evidence.

SAME.—Reversal of Judgment.—Harmless Error.—In a criminal cause the Supreme Court is not authorized to reverse the judgment for an error which does no harm or injury to the defendant.

97	579
127	225
97	579
184	91
97	579
139	538
97	579
149	413
149	705
150	85

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SAME.—Trial by Jury.—Waiver of Constitutional Right.—Statute Construed.—

Under section 13 of the Bill of Rights in the Constitution of this State, the defendant in a criminal cause has the constitutional right to a public trial by an impartial jury, but the right is one which, under the provisions of section 1821, R. S. 1881, he may waive, except in a capital case. This section of the statute is a constitutional and valid law.

From the Owen Circuit Court.

J. H. Fowler, for appellant.

F. T. Hord, Attorney General, *F. P. A. Phelps*, Prosecuting Attorney, and *W. B. Hord*, for the State.

HOWK, J.—In this case the indictment charged the appellant with an assault, with the felonious intent to kill and murder one Jacob Kersch. Upon his arraignment and plea of not guilty, the issues joined were, by agreement of the parties, submitted to the court for trial without the intervention of a jury. The court found the appellant guilty as charged in the indictment, and assessed his punishment at confinement in the State prison for a period of seven years, and a fine in the sum of \$100. Over the appellant's motion for a new trial, and his exception saved, the court rendered judgment against him on its finding.

The first error assigned by the appellant in this court is the overruling of his motion for a new trial. Under this error the appellant's counsel first insist that the punishment assessed by the court is excessive and oppressive. In section 1909, R. S. 1881, the offence charged against the appellant, and of which he was found guilty, is defined and its punishment is therein prescribed at imprisonment "in the State prison not more than fourteen years nor less than two years," and a fine "not exceeding two thousand dollars." It will be seen, therefore, from our statement of this case, that the punishment assessed against the appellant is within the limits of the punishment prescribed by the statute for such an offence. In *McCulley v. State*, 62 Ind. 428, upon the point now under consideration, this court said: "It was the province of the jury

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to affix the appellant's punishment, and even if the punishment seemed severe, if it was within the law, as it clearly is, we would not disturb the verdict on that ground." We adhere to this view of the question under consideration in the case at bar, and even though the punishment assessed against the appellant might seem to be excessive and oppressive, yet we can not disturb the finding of the court on that ground; for the punishment assessed was within the law.

It is also insisted by the appellant's counsel that the finding of the court was not sustained by sufficient evidence. There was evidence introduced to the effect that on the 20th day of February, 1884, the appellant went into the saloon of the prosecuting witness, Jacob Kersch, in the town of Quincy, in Owen county, and asked for a drink of whiskey. Kersch refused him the whiskey; told him he already had enough whiskey, and had better take ginger-pop. Appellant replied that he knew what he wanted, and that if he couldn't get what he wanted he would not have anything; and Kersch could put him out if he wished. Kersch took the appellant to the door, and he went out without resistance or apparent anger. Soon after the appellant was put out of the saloon three pistol shots were fired from the outside apparently at the door through which he was put out, Kersch being at the time behind the door on the inside of the saloon. The ball from one of the pistol shots lodged in the door-casing; the ball from another shot passed through the door itself and lodged in a door of the saloon opening into the house; and the ball from the other shot was not accounted for. No one saw the appellant fire these pistol shots, or either of them, so far as the evidence shows.

The point is made on behalf of the appellant that the evidence fails to show he fired the pistol shots, and that, for this reason, it was error to overrule his motion for a new trial. It was shown by the evidence, however, that immediately after the pistol shots were fired, the appellant was seen in the vi-

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cinity of the saloon with a five-chambered revolver pistol in his hands; but three or four chambers were loaded shortly after the shooting occurred. The evidence was not so clear or convincing, nor so satisfactory, as it might, and, perhaps, ought to have been, to have fully justified the court in finding the appellant guilty of the offence charged in the indictment. But the question of the sufficiency of the evidence to sustain the appellant's conviction of the offence wherewith he was charged, was submitted to the trial court without the intervention of a jury; and although the evidence, as we read it in the record, does not fully convince us of the appellant's guilt, yet we can not say that it fails on any material point to sustain his conviction. Of course, the learned judge who presided at the trial had opportunities and facilities which we, as an appellate court, can not possibly have for testing the credibility of the witnesses and determining the weight of the evidence. For this reason there must be an absolute failure of evidence to sustain the finding or verdict on some material point, before we would be justified in reversing the judgment on the evidence. There is no such failure of evidence in the case at bar upon the point under consideration.

But the appellant's counsel also insists that the finding of the court was not sustained by sufficient evidence, because it failed to show, as counsel claims, that the appellant had, at the time of the felonious assault charged in the indictment, "the present ability" to commit the particular felony mentioned therein. This point does not seem to us to be well taken. The evidence shows that the appellant had in his hands, at the time the assault was committed, a five-chambered revolver pistol loaded with cartridge and ball. There was evidence introduced, also, which tended to prove that the appellant fired three shots from his pistol at the door of Kersch's saloon, and that one of the balls so shot passed through such door, behind which Kersch then was, and through the saloon to and lodged in an opposite door. We think, therefore, that the evidence was sufficient to authorize the court to find not

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only the unlawful attempt of the appellant, but his present ability to commit the particular felony charged in the indictment. *State v. Swails*, 8 Ind. 524; *State v. Hubbs*, 58 Ind. 415; *Howard v. State*, 67 Ind. 401.

We are not authorized to disturb the finding, or reverse the judgment of the trial court, upon the evidence appearing in the record. *Cox v. State*, 49 Ind. 568.

The appellant has assigned as error the action of the circuit court "in changing the penalty of imprisonment and the fine assessed, after said penalty of imprisonment and fine had been announced in the presence of the appellant in open court, and after the court had entered such finding on its docket." It is shown by a bill of exceptions, properly in the record, that after the trial of this cause was closed, to wit, on June 11th, 1884, the court announced its findings in open court, in the presence of the appellant, to the effect that the court found him guilty as charged, and assessed his punishment at seven years' imprisonment in the State prison, and assessed his fine at \$100, whereupon he was committed to jail without the rendition of judgment on such finding. On the next day, June 12th, 1884, the court, of its own motion, ordered the appellant to be brought into open court, and, of its own motion, in the presence of appellant and his counsel, announced that as the appellant's counsel thought the punishment too severe, in deference to this opinion, the court was willing to reduce the punishment to five years' imprisonment in the State prison and a fine of \$10, and changed the pencil entry of its finding accordingly on the judge's or court docket. Whereupon the appellant, by his counsel, announced that he had filed no motion for a modification of the judgment, but had filed a motion for a new trial, and would save an exception to such action of the court. Thereupon the court announced that it would let its finding stand as originally entered, and made the necessary change on the court docket for that purpose, to which the appellant then excepted. Afterwards, as heretofore stated, the court rendered judgment

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against the appellant upon and in accordance with its original finding, and no other or different judgment was rendered in the cause.

It will be observed from the error assigned here by the appellant, that he complains only of the proposed action of the trial court, namely, to reduce his imprisonment in the State prison from seven years to five years, and to reduce his fine from \$100 to \$10. If this proposition had been accepted by the appellant, and had been fully consummated by the judgment of the court in accordance therewith, we fail to see how the appellant could have been injured or harmed thereby, even if such action of the court had been erroneous. And inasmuch as the proposed action was not accepted by the appellant, and was never consummated by the judgment of the court thereon, it is still more difficult for us to see how or why the appellant was injured or harmed by the naked proposition of the court to do an act, apparently in the interest and for the benefit of the appellant, but which, on account of his objection thereto, it never fully accomplished. Even if the proposed action of the court had been clearly erroneous, it was never fully consummated by the judgment of the court thereon, and the appellant was not harmed thereby. A harmless error will not authorize the reversal of a judgment in a criminal cause. *Binns v. State*, 66 Ind. 428; *Powers v. State*, 87 Ind. 144; section 1891, R. S. 1881.

The last error assigned by the appellant is as follows: "That the court had no jurisdiction to try the cause, and assess the fine and penalty of imprisonment." Section 1821, R. S. 1881, provides as follows: "The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases. All other trials must be by jury." It is claimed, however, by the appellant's counsel, that this section of the statute, in so far as it authorizes and provides for the trial of a criminal prosecution by the court, without the intervention of a jury, is repug-

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nant to and in conflict with section 13, in the Bill of Rights in our State Constitution. In this section 13, so far as applicable to the question under consideration, it is declared as follows: "In all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offence shall have been committed." Under this provision of the fundamental law of this State, there can be no doubt that the defendant, in a criminal prosecution, has the constitutional right to a public trial by an impartial jury. But it will not do to say, we think, that this right to a trial by jury is a right which the defendant may not waive, if he choose so to do, and if the law provide for such waiver. For, if the defendant can not waive his right to a trial by jury, neither can he waive his right to such trial in the county in which the offence shall have been committed; and the effect of such a conclusion would be to deprive him of the right and benefit of a change of venue from such county under any circumstances. Section 1821 of the criminal code, above quoted, does not deprive the defendant, in a criminal prosecution, of his constitutional right to a public trial by an impartial jury. It simply provides by law that such defendant, by agreement with the prosecuting attorney, and with the assent of the court, may, if he choose so to do, waive his constitutional right to a trial by jury and "submit the trial to the court." Such statutory provision is neither repugnant to nor in conflict with any provision of our State Constitution, and is not void. *Butler v. State*, ante, p. 378 (opinion by ELLIOTT, C. J., and authorities cited).

We have found no error in the record of this cause which requires a reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 14, 1884.

Pittsburgh, Fort Wayne and Chicago R. W. Co. v. Swinney, Executrix.

No. 8652.

PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY v. SWINNEY, EXECUTRIX.

SUPREME COURT.—*Misjoinder of Causes.*—The statute, section 341, R. S. 1881, forbids in any case a reversal for overruling a demurrer to a complaint for misjoinder of causes of action.

DECEDENTS' ESTATES.—*Executor.*—*Trespass.*—*Joinder of Causes.*—An executor may join in the same complaint a paragraph for trespass *quare clausum fregit* during the testator's lifetime, with another for a like trespass after his death, to lands devised to the executor in trust for specific purposes, and this is not a misjoinder.

SAME.—*Damages.*—*Chose in Action.*—The right to damages for trespass to a testator's lands during his lifetime is a chose in action for which his executor may sue.

SAME.—*Parties.*—*Case Limited.*—Where lands are devised to an executor in trust for certain purposes, he is the proper plaintiff in a suit for trespass thereto after the death of the testator. *Taylor v. Fickas*, 64 Ind. 167, limited.

RAILROADS.—*Appropriation of Land.*—*Trespass.*—*License.*—*Limitations.*—The right of a railroad company, given by section 3907, R. S. 1881, to enter upon lands and remain in possession during the pendency of proceedings by it to condemn lands to public use, is a license which is lost by its subsequent dismissal of the proceedings, during the pendency of an appeal therein, and thereupon it becomes a trespasser *ab initio*. And in such case certainly the plaintiff may bring his suit within a reasonable time after such dismissal, and *perhaps* the statute of limitations only then begins to run.

SAME.—*Remedy.*—*Cases Overruled.*—When a railroad company, under color of proceedings to condemn lands for public use, enters, and then dismisses its proceedings, the owner may sue for trespass, and is not restricted to the remedy by writ of *Ad quod damnum* given by statute. *Victory v. Fitzpatrick*, 8 Ind. 281, *McCormack v. Terre Haute, etc., R. R. Co.*, 9 Ind. 283, and *Indiana, etc., R. W. Co. v. Oakes*, 20 Ind. 9, have been expressly or by implication overruled.

TRESPASS.—*Real Estate.*—*Measure of Damages.*—*Interest.*—In ascertaining the damages for a trespass to lands and removing material therefrom, the jury may, in their discretion, add to the value of the material taken interest thereon at six per cent. per annum, without finding, as in suits on contract, that there has been unreasonable delay of payment.

From the Superior Court of Allen County.

97	586
181	488
182	408
97	586
185	101
97	586
160	644

97	586
162	309
162	683
97	586
168	502

Pittsburgh, Fort Wayne and Chicago R. W. Co. v. Swinney, Executrix.

J. Brackenridge, J. R. Cary, T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and E. Daniels, for appellant.

J. I. Best, L. M. Ninde and P. A. Randall, for appellee.

NIBLACK, J.—This action was commenced by Rhesa Swinney, executrix of the last will of Thomas W. Swinney, deceased, on the 6th day of January, 1879, against the Pittsburgh, Fort Wayne and Chicago Railway Company, for alleged injuries to real estate. The complaint was in three paragraphs.

The first paragraph charged that, on the 20th day of July 1871, and previously, the decedent was the owner and in the possession of a particularly described tract of land, lying near the city of Fort Wayne, and containing about four and one-quarter acres, upon which there was deposited a gravel and sand bed, thirty feet in depth; that on that day the defendant, by its agents, servants and employees, wrongfully and wilfully entered into and upon said tract of land, and on divers days between that time and the 30th day of January, 1875, when the decedent died, dug up and carried way 180,000 yards of the gravel, and the same amount of the sand deposited thereon, leaving said lands covered with pools of stagnant water, and greatly injuring the decedent's adjoining lands.

The second paragraph charged that the tract of land described in the first paragraph was devised to the plaintiff, as the executrix, by the last will of the said Thomas W. Swinney, deceased, to be used and disposed of by her for certain purposes expressed in said will; that after the death of the testator the defendant, by its agents, servants and employees, wrongfully and wilfully entered into and upon said tract of land and dug up and carried away 180,000 yards of gravel, and a like amount of sand, found upon the same, to her damage as such executrix.

The third paragraph charged that, on the 20th day of

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July, 1871, the defendant went into possession of the tract of land referred to in the preceding paragraphs, under color of certain legal proceedings, which it afterwards dismissed and abandoned, and continued in the possession thereof until the 1st day of January, 1879, to the exclusion, first, of the testator, who was the lawful owner for the rest of his life, and afterwards of the plaintiff, as his executrix; that while so in possession the defendant dug up and carried away from said tract of land 180,000 yards of gravel, and a corresponding amount of sand, to the damage of the testator in his lifetime and of the plaintiff, as his executrix, since his death.

A demurrer to the complaint, for an alleged misjoinder of causes of action, being first overruled, the defendant demurred separately to each paragraph for insufficiency of the facts relied on for a recovery, but all the paragraphs were severally held to be sufficient upon demurrer.

The defendant then answered in six paragraphs.

The first was in general denial.

The second averred that the tract of land described in the several paragraphs of the complaint became necessary and indispensable for the defendant's use in ballasting, repairing and operating its railroad; that it accordingly, on the 25th day of July, 1870, appropriated said tract of land to its own use, and, on the same day, made out and deposited with the clerk of the circuit court of Allen county, a description of the rights and interests so appropriated, together with a plat of said land; that being unable to agree with the said Thomas W. Swinney, then in life, as to the price of the land so appropriated, it on the 5th day of August, 1870, by its petition in writing, made application to the judge of the Allen Circuit Court, then in vacation, for the appointment of suitable persons to assess the damages which the said Swinney might sustain by reason of the appropriation so made by the defendant; that, on the 8th day of August, 1870, said judge appointed three disinterested and competent freeholders of the county

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of Allen as appraisers to assess such damages; that said appraisers being first duly sworn, proceeded on the next day to examine the premises and to make an assessment of the damages which the said Swinney would sustain, fixing the amount at the sum of \$10,000, and making return in writing of their said assessment to the clerk of the said Allen Circuit Court, in whose office the same was filed and recorded; that upon the return of such assessment, the defendant paid to said clerk, for the use of the said Swinney, said sum of \$10,000 in lawful money of the United States; that having so appropriated said tract of land, and having so paid the damages resulting from such appropriation, the defendant dug up and carried away the gravel and sand found upon the same as it lawfully might.

The third paragraph pleaded the six years statute of limitations in defence of the action.

The fourth paragraph set up in a different form substantially the same facts contained in the second paragraph.

The fifth and sixth paragraphs were but varyingly stated repetitions of the defence of the six years statute of limitations.

The plaintiff replied, *First*. In denial of all the special paragraphs of the answer. *Secondly*. To the second and fourth paragraphs, that within ten days after the award of the appraisers was made and filed, the testator, Thomas W. Swinney, filed with the clerk of the Allen Circuit Court exceptions to the same; that afterwards the defendant caused the venue of the proceedings to be had upon such exceptions to be changed to the Whitley Circuit Court; that thereupon said Whitley Circuit Court proceeded to review the award of the appraisers, and to order a new assessment of the damages; that the question as to the amount of damages which ought to be awarded to the testator was then submitted to a jury, who returned a verdict assessing his damages at \$39,750, upon which judgment was rendered against the defendant; that the defendant afterwards appealed the cause to the Supreme Court,

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where the judgment was reversed, and the cause was remanded for further proceedings; that during the pendency of the appeal the testator died, and after the return of the cause to the Whitley Circuit Court, the name of the plaintiff, as his executrix, was substituted; that after the name of the plaintiff had been so substituted, to wit, on the 2d day of December, 1878, the defendant, over her objection, voluntarily dismissed the cause and abandoned its proceedings for the appropriation of the land in controversy.* *Thirdly.* To the third, fifth and sixth paragraphs, that the right to sue for the trespasses set forth in the complaint was suspended until the 2d day of December, 1878, by the proceedings set out in the second and fourth paragraphs of answer, and referred to in the preceding paragraph of reply.

Additional paragraphs of reply, known as numbers four and five, were also filed, but number four contained merely a substantial restatement of the facts contained in the second paragraph, and number five set up only more in detail the matters replied by the third paragraph. Demurrers were severally overruled to all of these special paragraphs of reply.

There was a verdict for the plaintiff, assessing her damages, as executrix, at \$44,950. A new trial was denied, and the plaintiff had judgment on the verdict.

The defendant, appealing, insists that as the first paragraph of the complaint was for trespasses committed in the lifetime of the owner of the real estate, and that as the second paragraph was for damages sustained by the appellee as devisee of the real estate, and that as the third paragraph was, in substance, only an application for the assessment of damages under the statute, the complaint presented a different and much more flagrant misjoinder of causes of action than the kind of misjoinder referred to in sections 50 and 52, code of 1852, for which a judgment will not be reversed, and that for these reasons the court below committed an available error in overruling the demurrer for misjoinder of causes of action in this cause.

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The latter section provided that "No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action," and that provision is continued in force by section 341 of the code of 1881. As applicable to the complaint in this case, we are unable to recognize the distinction insisted upon by counsel for appellant, or, indeed, to see that there was any misjoinder of causes of action. When causes of action belong to the same class, and are between the same parties, and also inure to the benefit of the plaintiff in the same right, they may be joined. This case fully meets all of those requirements, since all of the damages demanded would constitute assets in the hands of the appellee. *Lowe v. Bowman*, 5 Blackf. 410; *Fry v. Evans*, 8 Wend. 530; *Lea v. Hopkins*, 7 Pa. St. 385; *Pomeroy Rem.*, sections 479, 480; 1 Works Pr., section 336.

It is further insisted that the first paragraph of the complaint was bad upon demurrer upon the ground that the appellee, as executrix, had no right to sue for the damages inflicted upon the land in the lifetime of her testator, and the case of *Taylor v. Fickas*, 64 Ind. 167 (31 Am. R. 114), is cited and relied on as sustaining that doctrine. In that case this court did say, "If this complaint" (referring to the complaint in that case) "was brought solely in the right of an administrator, the action would not lie. An administrator can not sue for an injury to the freehold." While this statement of the law may be somewhat obscure, and even misleading, in the connection in which it is found, and may be justly obnoxious to criticism for that reason, it was clearly only intended to mean that an administrator can not sue for an injury to the freehold committed after the death of the intestate, and ought to be so construed, when considered in its application to the facts then before this court. This is obvious from the conclusion reached by us in the more recent case of *Church v. Grand Rapids, etc., R. R. Co.*, 70 Ind. 161.

Damages accruing to the owner of real estate for a trespass committed in his lifetime constitute a chose in action

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in the hands of his executor or administrator. Williams Ex., bottom p. 1656 and note; *Church v. Grand Rapids, etc., R. R. Co., supra.*

It is also claimed that the damages demanded by the second paragraph of the complaint went to the heirs of the testator and not to the appellee, and that, for that cause, that paragraph was also bad upon demurrer. It is true that where no provision is expressly made to the contrary, the real estate of which a decedent is seized at the time of his death, together with all subsequently accruing rights of action concerning the same, descends to his heirs. But the paragraph under consideration averred that the land therein described was devised to the appellee, as executrix, to be used and disposed of by her for certain specific purposes. That devise conferred upon the appellee, as executrix, the right to sue for injuries to the land so long as she remains the executrix under the will, unless sooner disposed of by her. 2 R. S. 1876, p. 34, section 4; R. S. 1881, section 252; Pomeroy Rem., section 171, *et seq.*; *Ege v. Sidle*, 3 Pa. St. 115; *Cobb v. Biddle*, 14 Pa. St. 444; *Wilson v. Shoenberger*, 34 Pa. St. 121; *People v. Robinson*, 29 Barb. 77; *Aubuchon v. Lorey*, 23 Mo. 99.

The reasons assigned in support of the preceding paragraph sustain, with equal force, the sufficiency of the third paragraph of the complaint. The allegation, that the appellant entered upon the land under color of certain legal proceedings, which it afterwards dismissed, was mere surplusage, neither weakening nor strengthening the paragraph in any essential particular.

The 15th section of the general railroad law of May 11th, 1852 (1 R. S. 1876, p. 705; R. S. 1881, section 3907), treats the filing of exceptions to the award of appraisers, appointed upon the application of a railroad company, as an appeal from the award to the court, under whose authority the appraisers were appointed, and has, in connection with the au-

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thority to appeal in that way, a proviso as follows: "*Provided*, That notwithstanding such appeal, such company may take possession of the property therein described, as aforesaid, and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." This proviso served as a license to the appellant to enter into and to continue in the possession of the property in dispute, pending the litigation which became necessary to determine the amount of compensation which it should be required to pay to enable it to acquire title, but like other licenses conferred for a specific purpose, or upon stipulated terms, it was liable to be forfeited for perversion of the purposes for, or a non-compliance with the terms upon, which it was granted. An abuse of a license conferred by law makes the licensee a trespasser *ab initio*. Cooley Torts, 313, 316; 6 Wait's Actions and Defenses, p. 87, and vol. 7, p. 204; *Six Carpenters Case*, 8 Coke, 290; *Malcom v. Spoor*, 12 Met. 279; *Dumont v. Smith*, 4 Denio, 319; *Stone v. Knapp*, 29 Vt. 501.

The voluntary dismissal of the proceedings instituted by the appellant for the assessment of the damages occasioned by its appropriation of the land, after having carried away so much gravel and sand, and in the manner described in the second and fourth paragraphs of the reply, constituted what appears to us to have been such an abuse of the license conferred by the proviso to section 15, *supra*, as made the appellant a trespasser from the beginning, and hence operated as a forfeiture of the protection which the license thus conferred was intended to afford. *Lake Erie, etc., R. W. Co. v. Kinsey*, 87 Ind. 514.

The license which the proviso in question authorized was conferred upon the implied, but none the less evident, condition that the appellant would proceed in good faith, and without unnecessary delay, to have the amount, which it would be required to pay for the land, ascertained and finally estab-

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lished, and that it would, within a reasonable time thereafter, pay to the owner the amount thus finally established. *City of Chicago v. Barbican*, 80 Ill. 482; *Lee v. North Western Union R. W. Co.*, 33 Wis. 222. •

When the Whitley Circuit Court ordered a new appraisal of the land, the award of the appraisers ceased to be of binding force upon the parties, and the money paid into the clerk's office in discharge of the award ultimately reverted to the appellant. The subsequent dismissal of the proceedings did not reinstate the award for any purpose, and hence there is no question either arising out of or resting upon that instrument now before us.

The third paragraph of the reply addressed to the several paragraphs of the answer, setting up the six years statute of limitations, presents what is, to our minds, a much more difficult question than any that has preceded it.

In the first place, we find no case affording an exact precedent upon which a conclusion upon the question thus presented might be based. In the next place, divergent conclusions have been reached in many cases bearing strong analogies to the question now involved. It is true that many of these divergencies result from varying and conflicting statutes affecting, in some manner, the limitation of actions, but others have arisen from a seemingly different application of the same elementary principles. Our statutes prescribe no definite rule upon the subject.

In this unsettled condition of judicial precedents, it is plainly our duty to adopt that line of policy which, in our opinion, best accords with the principles of justice.

In the case of *Doughty v. Doughty*, 2 Stockt. 347, it was decided that where a court of equity had, at the solicitation of a suitor, invoking its aid, interfered with the legal rights of another, and impaired his remedy, it was the court's duty to protect the party whose remedy had been thus impaired against any undue advantage which might otherwise

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result to the suitor so invoking the aid of the court; that it would be, consequently, unconscionable to permit a party to plead the statute of limitations against an adversary, who, at the former's solicitation, had been enjoined from prosecuting his suit. The same doctrine has been either expressly, or in general terms, recognized by the following cases: *Stanbrough v. McCall*, 4 La. An. 322; *Fortier v. Zimple*, 6 La. An. 53; *Moore v. Crockett*, 29 Tenn. 365; *Wilkinson v. Flowers*, 37 Miss. 579; *Little v. Price*, 1 Md. Ch. Dec. 182; *Hutsonpiller v. Stover*, 12 Grattan, 579; *King v. Baker*, 29 Pa. St. 200.

This court, in the case of *Ney v. Swinney*, 36 Ind. 454, held, and we have no doubt correctly, that where a railroad company had appropriated the land of another, and had instituted proceedings against the owner for the appraisal of the damages, under the general railroad law of 1852, such owner could not seek any other remedy against the railroad company while such proceedings were pending. Proceedings, therefore, of that kind practically as much restrain the owner of the land from resorting to any other remedy as would an injunction to that effect granted against him by a court of competent authority. With this practical effect in view, we know of no principle, either of elementary law or of sound morals, which ought to render the doctrine enunciated in the case of *Doughty v. Doughty*, above referred to, inapplicable to the facts pleaded in the paragraph of the reply now under consideration. We think it would be indeed quite unconscionable to hold that the doctrine of that case is not decisive of the sufficiency of the paragraph of reply in question. Whether, upon the facts alleged, the appellee had six years remaining within which to commence this action after the appropriation proceedings began by the appellant were dismissed, or was only allowed reasonable time thereafter within which to bring her action, is a question not now presented, and concerning which nothing is now decided, as this suit was, in any event, commenced within a

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reasonable time after such dismissal. *Perkins v. Rogers*, 35 Ind. 124 (9 Am. R. 639). As to cases holding adversely to the views we have expressed upon the sufficiency of the third paragraph of the reply as above, see *Wood Lim.* 484, and *Angell Lim.*, section 485, *et seq.*

At the trial the court, in connection with other charges given at the same time, instructed the jury as follows: "If you find that the defendant wrongfully entered upon the premises described in the complaint, as averred therein, and carried away therefrom, or directed, aided and assisted others in carrying away therefrom 100,000 cubic yards of sand and gravel deposited thereon, and you further find that a large portion thereof was taken and carried away several years ago, then you may consider all the circumstances under which it was taken, the length of time that has elapsed since the taking, and find such sum as will fairly compensate the plaintiff for the injury done, but any sum added to the amount of the value of the material taken by way of damages, and for the purpose of compensation for loss sustained by reason of the plaintiff or her testator being delayed in the payment of this claim, should not exceed the amount which would accrue on the principal sum, if calculated as interest for the time for which such payments may have been delayed, at the rate of six per cent. per annum."

It is argued that this instruction did not state the law, as applicable to this case correctly, in at least one essential respect; that it should have been so framed as to have directed the jury that if they found for the appellee they might allow interest or its equivalent only in the event they also found that the money, properly due for damages, had been withheld by unreasonable delay of payment, citing *Rogers v. West*, 9 Ind. 400; *Borum v. Fouts*, 15 Ind. 50; *Reed v. Helm*, 15 Ind. 428; *Frazer v. Boss*, 66 Ind. 1; *Dobenspeck v. Armel*, 11 Ind. 31; *Bissell v. Hopkins*, 4 Cowen, 53; *City of Pekin v. Reynolds*, 31 Ill. 529; *Hoyt v. Gelston*, 13 Johns. 139, and other cases in support of that position.

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“There are two classes of cases,” says the Supreme Court of New Hampshire, in *McIlvaine v. Wilkins*, 12 N. H. 474, “in which interest may be recovered. The first is * * * where it is an incident to the debt, founded upon the agreement of the parties, and is a legal claim, which the court are bound to allow. The other class is that where interest may be allowed by a jury, in the nature of damages.” And this case has been quoted approvingly by Sedgwick on Dam. (7th ed.) vol. 2, 190. That author, continuing, says: “This is generally so in actions of tort, as trover or trespass for taking goods, where interest is allowed at the discretion of the jury,” referring to numerous cases as sustaining that construction of the law in the assessment of damages in cases of torts. In one of the cases thus referred to, the Supreme Court of New York said: “The plaintiff ought not to be deprived of his property, for years, without compensation for the loss of it, and the jury had a discretion to allow interest in this case, as damages. It has been allowed in actions of trover, and the same rule applies in trespass when brought for the recovery of property.” *Beals v. Guernsey*, 8 Johns. 446.

In speaking of wrongs to personal property and the proper measure of damages for its conversion, Cooley on Torts, in a note to page 457, says: “But in most cases, when the circumstances are not such as to warrant exemplary damages, a just indemnity will consist in the value of the property at the time of the conversion, with interest thereon to the time of trial.”

In Wood's Mayne on Damages, at section 511, on page 500, the rule is stated to be, in actions of trover, that “The jury may, if they think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion.” A note upon the same page states that “Interest from the time of conversion is allowed in all cases in the discretion of the jury,” in connection with which many cases are cited.

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As has been seen, and as might be further shown, the same general rules apply in the assessment of damages for the conversion of personal property in actions of trespass as in trover, and the same may be said of actions of trespass *quare clausum fregit*, where, as in this case, the *gravamen* of the injury is the carrying away and conversion of personal property found on the premises. *Barton Coal Co. v. Cox*, 39 Md. 1.

When the gravel and sand in contest, in this case, were severed from the soil, they became personal property, for the carrying away and conversion of which damages might be assessed as in cases of other kinds of personal property. 2 Hilliard Torts, 57; 1 Addison Torts, 411; *Sampson v. Hammond*, 4 Cal. 184; *Rich v. Baker*, 3 Denio, 79; *Riley v. Boston, etc., Co.*, 11 Cush. 11; 1 Hill. Torts, 501; *Hail v. Reed*, 15 B. Mon. 479.

What has been said by Sedgwick and other text-writers, as above, on the subject of the assessment of damages in actions of trover and trespass *de bonis asportatis*, applies as well to the case at bar, and has the support of what we regard as the undoubted, if not the overwhelming, weight of authority. The cases cited on behalf of the appellant have reference either to actions for breaches of contracts, either express or implied, or to actions otherwise essentially differing from this in the nature of the damages which were to be assessed, and are, as we believe, not inconsistent with the doctrine of these text-writers when carefully distinguished. See, also, *Lawrence R. R. Co. v. Cobb*, 35 Ohio St. 94; *Bradley v. Geiselman*, 22 Ill. 494; *Chicago, etc., R. W. Co. v. Shultz*, 55 Ill. 421; Addison Torts, Dudley and Baylies' ed., 458 and note.

It is further argued that the only way left open to the appellee after the appropriation proceedings, brought by the appellant, were dismissed, was to make application for the assessment of her damages under what is known as the *Ad quod damnum* statute, providing for the appraisement of damages in such and similar purposes, and that, for that reason, all the

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proceedings had in this case have been, from the beginning to the ending, erroneous. The cases of *Victory v. Fitzpatrick*, 8 Ind. 281, *McCormack v. Terre Haute, etc., R. R. Co.*, 9 Ind. 283, and *Indiana, etc., R. W. Co. v. Oakes*, 20 Ind. 9, are relied upon as maintaining that construction of the law as it then existed. But these cases have all been either expressly or impliedly overruled, and are hence no longer followed as precedents. *Sidener v. Norristown, etc., T. P. Co.*, 23 Ind. 623; *Graham v. Columbus, etc., R. W. Co.*, 27 Ind. 260; *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178; *Anderson, etc., R. R. Co. v. Kernodle*, 54 Ind. 314; *Terre Haute, etc., R. R. Co. v. Scott*, 74 Ind. 29.

The accepted doctrine now is that where a railroad company, or other corporation possessing similar powers, takes possession, and enters into the use of real estate, without the consent of the owner, and without taking the necessary measures to acquire the title it assumes to assert, the owner may resort to any or all of the usual remedies known to the law for the protection of his estate in the property. *Lake Erie, etc., R. W. Co. v. Kinsey, supra.*

No question is made upon the amount of the damages assessed by the jury, and, believing that what we have said fairly disposes of all the material and controlling questions presented by this appeal, we will not extend this opinion by commenting upon some other matters incidentally referred to in argument.

The judgment is affirmed, with costs.

ZOLLARS, J., did not participate in the decision of this cause.

Filed Oct. 8, 1884.

Horner v. Hoadley.

No. 11,094.

HORNER v. HOADLEY.

BILL OF EXCEPTIONS.—Record.—Evidence.—When time is given beyond the term to file a bill of exceptions, and the record fails to show when it was presented to the judge, or when it was filed, it can not be considered as part of the record.

PRACTICE.—Instructions.—Exceptions.—Waiver.—Where no exception to the refusal of the court to give instructions in writing is taken at the time, the objection thereto is regarded as waived.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sillers*, for appellant.

J. H. Wallace, for appellee.

HAMMOND, J.—Complaint upon a promissory note, to which appellee answered by denial under oath. There was a trial by jury, and verdict for appellee, upon which judgment was rendered over appellant's motion for a new trial. The overruling of this motion is assigned for error. The causes for a new trial, set out in the motion, related to questions of evidence and to the court's refusal to instruct the jury in writing. Time beyond the term was granted appellant in which to file his bill of exceptions, and there is copied in the transcript what purports to be a bill of exceptions containing the evidence. The date when the bill of exceptions was presented to the judge is not stated. It does not appear when the bill of exceptions was filed, nor, in fact, that it was ever filed. It is clear, therefore, that the bill of exceptions forms no part of the record, and that questions involved in the motion for a new trial relating to the evidence can not be considered. Sections 626 and 629, R. S. 1881; Buskirk Pr. 144; 2 Works Pr., section 1076.

Before the commencement of the argument to the jury, appellant requested the court to give its charge in writing, which the court declined to do. No exception, however was taken

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by appellant to the court's refusal to so instruct the jury. Where a party wishes to have a ruling of the trial court reviewed by this court, he must except thereto at the time it is made in proper and légal form, and if he fails to do so, his objection will be regarded as waived. *Fisher v. Purdue*, 48 Ind. 323; 2 Works Pr., section 1071.

We are unable to discover any error in the record. Affirmed, with costs.

Filed Oct. 8, 1884.

No. 11,545.

DAVIS ET AL. v. SMITH ET AL.

From the Madison Circuit Court.

C. L. Henry and *H. C. Ryan*, for appellants.

M. S. Robinson, *J. W. Lovett*, *W. R. Pierse* and *C. B. Gerard*, for appellees.

FRANKLIN, C.—Appellant Davis purchased certain lands in 1870; in 1878 he had become delinquent as guardian for certain heirs; he and his co-appellant, his wife, then conveyed the lands to one Randall, who conveyed them back to the wife.

Judgment was rendered against him and appellees, as his sureties, on his guardian bond. The sureties paid the judgment, took out execution, had the land sold, bid it in, got a sheriff's deed, and commenced an action to set aside the deeds to Randall and to Mrs. Davis for fraud, and for possession of the lands. That suit was compromised by the execution of the notes and mortgage herein sued upon, and the rendering of a judgment quieting the title to the lands in Mrs. Davis.

In this case judgment was rendered against Davis on the notes, and a decree of foreclosure against both Davis and his wife. The errors complained of are the overruling of a demurrer to the second paragraph of the reply, and the overruling of the motion for a new trial.

We find no second paragraph of reply in the record, to which a demurrer could be overruled. The reply is all in one paragraph, and that is not numbered. If the demurrer had been addressed to that, we see no reason why it would have been error to have overruled it.

The only reasons urged for a new trial are that the finding of the court was contrary to law and not supported by sufficient evidence.

There was evidence clearly tending to support the finding of the court, and for that reason the finding was not contrary to law.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Oct. 9, 1884.

Zimmerman v. Love, Executrix.

No. 11,525.

RICKETTS v. COLES.

From the Ohio Circuit Court.

J. C. Ricketts, for appellant.

A. C. Downey and *G. E. Downey*, for appellee.

COLERICK, C. This action was brought by the appellee to recover the value of certain services which he rendered as an attorney for the appellant. The issues were tried by a jury, resulting, over a motion for a new trial, in the rendition of a judgment in favor of the appellee. The only question presented for our consideration involves the correctness of the ruling of the court below in overruling the motion for a new trial. The reasons assigned in support of the motion were, that the verdict was not sustained by sufficient evidence, and was contrary to law, and that the court erred in refusing to give to the jury certain special instructions which were presented by the appellant.

We have examined the evidence, which is in the record, and find that, although conflicting, it strongly tends, at least, to sustain the verdict. Therefore, under the well and long established practice of this court, we can not disturb the verdict on the weight of the evidence.

The instructions given to the jury by the court, on its own motion, are not in the record. In their absence we can not say that they did not fully embrace and cover all the principles of law correctly asserted in the special instructions, and for that reason that the special instructions were not properly refused by the court. The presumption is that the court performed its duty, and gave general instructions covering the issues in the case. *City of Indianapolis v. Murphy*, 91 Ind. 382.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Sept. 18, 1884.

No. 11,461.

ZIMMERMAN v. LOVE, EXECUTRIX.

From the Marion Circuit Court.

J. B. Julian and *J. F. Julian*, for appellant.

T. L. Sullivan, *A. Q. Jones*, *F. Rand* and *J. M. Winters*, for appellee.

HOWK, J.—The questions for decision in this case are substantially the same, and are presented in the same manner, as those which were considered and decided by this court in the case of *McCurdy v. Love*, ante, p. 62.

Upon the authority of the case cited the judgment in this cause is affirmed, with costs.

Filed Sept. 16, 1884.

Jones, Administratrix, v. Mathey.

No. 10,293.

FRENZEL v. BRADBURY.

From the Marion Circuit Court.

U. J. Hammond, for appellant.

S. M. Bruce, for appellee.

HAMMOND, J.—Action by the appellee against the appellant for services in and about the purchase of certain real estate. The case was tried by the court, with a finding and judgment for the appellee.

The only question in the case is whether the evidence is sufficient to sustain the decision of the court. We have examined the evidence carefully. Upon the material points in issue, there was no evidence except that of the parties. The testimony of the appellee fully and explicitly makes out his case. He claims that by the contract between him and the appellant, he was to receive \$250 for his services, to be paid by the appellant in the event he secured from the owner an agreement to sell the property for a certain price. This he did by obtaining from the owner a deed with the name of the grantee left blank, to be inserted as appellant should desire, and delivered on payment of the purchase-money. The appellant, it seems, was acting for himself and others, as members of a society, and after making an effort, by subscription, failed to raise the money, and the purchase was not consummated. The appellant claims that the appellee was to be paid by the society for whom he was acting, and only in the event that the purchase-money was raised and the transaction completed. As the evidence comes to us in the record, both parties appear to have been candid, and doubtless the discrepancy in their testimony arises from the infirmity of the memory of one of them, rather than from any purpose to evade the truth. But as the evidence of the appellee supports the finding of the court, we can not, as has often been decided by this court, weigh the evidence to determine which of the parties was correct. That was the duty of the trial court, and the rules of this court require us to presume that the duty was rightly discharged. 1 Works Pr., section 914.

Judgment affirmed, at appellant's costs.

Filed Nov. 6, 1883. Petition for a rehearing overruled June 28, 1884.

No. 11,495.

JONES, ADMINISTRATRIX, v. MATHEY.

From the Harrison Circuit Court.

N. R. Peckinpaugh, *W. T. Zenor* and *S. J. Wright*, for appellant.

W. N. Tracewell and *R. J. Tracewell*, for appellee.

BLACK, C.—The questions involved in this case are like those decided

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in *Jones v. Jones*, ante, p. 188, and upon the authority of that case the judgment should be reversed.

PER CURIAM.—It is ordered that the judgment be reversed, and the cause is remanded for a new trial.

Filed Sept. 20, 1884,

No. 10,079.

HODGSON v. THE BOARD OF COMMISSIONERS OF MARION COUNTY.

From the Superior Court of Marion County.

C. P. Jacobs, J. W. Nichol and R. Hall, for appellant.

J. T. Dye and A. C. Harris, for appellee.

COLERICK, C.—This action was brought by the appellant to recover a balance alleged to be due to him for services rendered by him as the architect of the Marion county court house and superintendent of its construction, under a contract with the appellee. The complaint consisted of two paragraphs. A demurrer was sustained to the first paragraph, and issues were formed on the second which were tried by the court, resulting, over a motion for a new trial, in the rendition of a judgment in favor of the appellee. The errors assigned are the rulings of the court below upon the demurrer to the first paragraph of the complaint, and upon the motion for a new trial. It is unnecessary to consider or determine the question presented by the appellant, as to the sufficiency of the first paragraph of the complaint, because, if any error was committed in sustaining the demurrer thereto, it was harmless, as all the material facts therein averred were alleged in, and could have been proven under, the second paragraph of the complaint.

It is well settled by the decisions of this court that the sustaining of a demurrer to a good paragraph of a pleading is a harmless error, if under another paragraph of the pleading the same matters are admissible in evidence. See *Buskirk* Prac. 284, and the cases there cited; also, *Epperson v. Hostetter*, 95 Ind. 583; *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491; *Lynn v. Crim*, 96 Ind. 89. And it is equally well settled that a judgment will not be reversed by this court for a harmless error committed in the court below. *Buskirk* Prac. 284; *Maxwell v. Brooks*, 54 Ind. 98; *Burroughs v. Wilson*, 59 Ind. 536; *Traylor v. Dykins*, 91 Ind. 229.

The only reasons assigned for a new trial were, that the finding of the court was not sustained by sufficient evidence, and was contrary to law and newly discovered evidence. The newly discovered evidence referred to in the motion for a new trial, was recited in certain affidavits which were presented in support of the motion, but these affidavits are not properly in the record, as they were not made a part thereof by bill of exceptions, or order of court, as required by the practice of this court, and, therefore, can not be considered by us. *Matlock v. Todd*, 19 Ind. 130; *Martin v. Harrison*, 50 Ind. 270; *Fryberger v. Perkins*, 66 Ind. 19; *Williams v. Potter*, 72 Ind. 354; *Iles v. Watson*, 76 Ind. 359; *Applegate v. Barley*, 93 Ind. 147.

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The finding of the court below was in harmony with and fully sustained by the evidence, which we have carefully examined, and was not contrary to law. The motion for a new trial was properly overruled. As there is no error in the record the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

ELLIOTT C. J., did not participate in the consideration or determination of this appeal.

Filed Sept. 18, 1884.

No. 11,633.

BUCHANAN ET AL. v. RADER ET AL.

From the Cass Circuit Court.

J. C. Nelson, H. C. Thornton and Q. A. Myers, for appellants.

S. T. McConnell, R. Magee and D. B. McConnell, for appellees.

BEST, C.—The appellants brought this action to review a judgment of the Cass Circuit Court establishing a ditch which extended into Fulton county, and to restrain one of the appellees as drainage commissioner from enforcing assessments made for the construction of such ditch upon the appellants' lands in Fulton county.

A demurrer to the complaint for the want of facts was overruled, and the judgment was reversed so far as it affected said lands, and said commissioner was perpetually enjoined from attempting to enforce the collection of such assessments.

The sole question presented by this ruling is whether the Cass Circuit Court, under the act of April 8th, 1881, possessed any power to establish that portion of the ditch which extended into Fulton county. This precise question was decided adversely to the appellees in the case of *Shaw v. State, etc., ante*, p. 23, and in the case of *Crist v. State, etc., ante*, p. 389, and to the conclusion reached in such cases we still adhere.

No other ground is taken in support of this complaint, and as this one is not well taken the same must be deemed insufficient, and for the error in overruling the demurrer the judgment should be reversed.

PER CURIAM.—It is therefore ordered that the judgment be and it is hereby reversed, at appellees' costs, with instructions to sustain the demurrer to the complaint.

Filed Oct. 9, 1884.

No. 11,567.

PYLES v. ADAMS ET AL.

From the Bartholomew Circuit Court.

M. D. Emig and W. S. Swengel, for appellant.

J. C. Orr and G. W. Cooper, for appellees.

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FRANKLIN, C.—The record in this case only contains the pleadings and rulings of the court thereon, and closes with the following allegation: "This cause is now set down for trial on May 24th, 1883." The pleadings show issues formed to be tried. The rulings upon the pleadings are mere interlocutory orders, from which, without any final judgment, no appeal to this court will lie.

The record shows that this court has no jurisdiction of the case. The appeal ought to be dismissed. *May v. State Bank*, 9 Ind. 233; *Pleasants v. Vevay, etc., Turnpike Co.*, 42 Ind. 391; *Wood v. Wood*, 51 Ind. 141; *Thiebaud v. Dufour*, 57 Ind. 598.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the appeal in this case be dismissed, at appellant's costs.

Filed Oct. 18, 1884.

No. 10,988.

ROTHCHILD v. REID.

From the Kosciusko Circuit Court.

J. S. Frazer, W. D. Frazer, H. S. Biggs, J. Morris, C. H. Aldrich and J. M. Barrett, for appellant.

J. D. Widaman, J. W. Cook, E. Haymond, L. H. Royse and T. E. Ellison, for appellee.

BLACK, C.—The only question involved in this case is that of the sufficiency of the evidence to sustain the verdict in favor of the defendant, in an action for the recovery of the possession of certain goods.

The verdict involved the conclusion that a sale of said goods by a mercantile firm to the appellant was fraudulent as against creditors. It seems to have been plainly shown that the sale was made with intent to defraud creditors; but it is insisted that the evidence did not show that the appellant, who purchased for a valuable consideration, had notice of the fraudulent intent.

While the evidence, as it appears in the record, would perhaps have permitted the jury to find that the purchaser did not participate in the fraud, but was merely seeking his own profit, yet the appellee, relying for the most part upon the examination of the parties to the transaction, brought out circumstances such that, after a careful consideration of the evidence, we conclude that to reverse the judgment would be an unwarranted encroachment upon the province of the jury and the trial court.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed May 29, 1884. Petition for a rehearing overruled Oct. 11, 1884.

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See SURETY OF PEACE, 3.

1. *Information.—Affidavit.—Motion to Quash.*—An information based upon an insufficient and defective affidavit should be quashed on motion, as also the affidavit itself. *Brunson v. State, 95*
2. *Same.—Obstructing Legal Process.*—An affidavit in a criminal prosecution, under section 2034, R. S. 1881, for freeing one under legal arrest, must charge that the defendant forcibly freed such person, knowing him to be under arrest. *Ib.*
3. *Indictment.—Name.*—An indictment should not be quashed because in the caption the middle letter of the defendant's name is inserted between the christian name and surname, and omitted in the body of the indictment. *O'Connor v. State, 104*
4. *Defective Affidavit.—Information.*—Where the affidavit is essentially defective, the defect extends with equal fatality to the information based thereon. *Engle v. State, 122*
5. *Indictment.—Return into Open Court.—Supreme Court.—Record.*—An indictment should be quashed, or a motion in arrest of judgment sustained, if the indictment was not returned into open court by the grand jury. On appeal to the Supreme Court, where such a motion has been sustained, the record must show affirmatively that the indictment was returned into open court. *State v. Dixon, 125*
6. *Murder.—Self-Defence.—Character of Deceased.—Evidence.*—In a trial for murder the defence was that the homicide was committed in self-defence. The defendant testified as a witness that when he shot the deceased the latter was striking at him with a knife, and that their acquaintance was a brief association as criminals. An offer to testify that the deceased had but the night before told the defendant of two felonious assaults which he had committed, and that he preferred a knife to a pistol as more effective for such work, was refused by the court. *Held, that this was error. Boyle v. State, 322*
7. *Same.—Dying Declarations.*—A dying statement by the victim of a hom-

icide, that the defendant had no reason for making the deadly assault, is admissible in evidence, being the statement of a fact, and not an opinion. *Ib.*

8. *Constitutional Law.—Pardons.—Reprieves.—Commutations.—Remissions of Fines and Forfeitures.*—Section 17 of article 5, under the limitations of article 3, of the Constitution of the State, confers upon the Governor the exclusive power to remit fines and forfeitures and to grant reprieves, commutations and pardons. *Butler v. State, 373*
9. *Same.—Cases Disapproved.*—So much of section 1888, R. S. 1881, as authorizes the Supreme Court or a judge thereof, on an appeal from a judgment of conviction, to suspend the sentence of death, and so much of section 1724, R. S. 1881, as invests courts with the power to remit forfeitures, are void as being in conflict with the constitutional provisions above mentioned. *State, ex rel., v. Speck, 20 Ind. 211, and State v. Shideler, 51 Ind. 64,* are disapproved so far as they recognize that the power to remit forfeitures does not exist exclusively in the Governor. *Ib.*
10. *Constitutional Law.—Right to Impose Terms Where Accused Asks to Take Depositions in a Foreign Jurisdiction.*—The Legislature has power to impose terms upon a person accused of crime, who asks and receives the privilege of taking depositions of witnesses in a foreign jurisdiction, and a statute which provides that the accused may take testimony by depositions in a foreign jurisdiction is not unconstitutional because it requires that the defendant shall enter of record his consent that the prosecution may also take the depositions of witnesses residing out of the State. *Butler v. State, 378*
11. *Same.—Federal Constitution.—In What Cases its Provisions Apply to State Prosecutions.*—The general rule is that the provisions of the National Constitution do not apply to the procedure by the State in prosecutions for offences against State laws, but when the constitutional provision names the States it is otherwise. As the States are not named in the section which provides that a person accused of crime shall "be confronted with the witnesses against him," its provisions do not control the question of the power of the State Legislature to enact a statute granting an accused a right to take depositions upon condition that he consent to the exercise of a similar right by the prosecution. *Ib.*
12. *Same.—Waiver of Constitutional Privilege.—Witnesses.*—A defendant in a criminal prosecution may waive the benefit of the constitutional privilege of being confronted by the witnesses. *Ib.*
13. *Same.—What Constitutes.—Depositions.*—Where the defendant accepts a right to take depositions in a foreign jurisdiction under a statute requiring him to concede a like privilege to the State, he waives the constitutional privilege of being confronted by the witnesses against him. *Ib.*
14. *Same.—Withdrawal of Consent.*—After the defendant has acted upon the order of the court, and taken depositions under it, he can not withdraw his consent. *Ib.*
15. *Same.—Practice.—Right to Limit Number of Witnesses.*—Within reasonable limits, the trial court has a right to limit the number of witnesses that may be called, and if there is no abuse of discretion the appellate court will not interfere. *Ib.*
16. *Same.—When Evidence Must be in Record.*—When it is necessary that all the evidence should be in the record in order to show that a ruling complained of injured the appellant, there can be no reversal in the absence of the evidence from the record. *Ib.*
17. *Same.—Jurors, Statements of.*—The statements of a juror in answer to questions touching his competency are to be taken together, and his competency is not to be determined from mere isolated and detached statements. *Ib.*

18. *Same.—Competency of Jurors.*—A juror is not necessarily incompetent because in answer to a question he discloses the fact that he has an erroneous view of the law governing the defence of insanity, but also discloses in his answers a willingness and an ability to yield readily to the law as it exists. *Ib.*
19. *Same.—Juror's Opinion of Feigned Defence of Insanity.*—A juror is not necessarily disqualified because he expresses an opinion that the defence of insanity should be carefully scrutinized, and also expresses himself as strongly opposed to feigned defences of that character, but states further that he is not prejudiced against genuine defences of that character. *Ib.*
20. *Same.—Juror's Opinion Founded on Rumors and Newspaper Reports.*—As a general rule opinions founded on newspaper reports and rumors do not disqualify. *Ib.*
21. *Sickness of Juror.—Discharge of Jury.—Jeopardy.—Constitutional Law.*—The sickness of a juror, and his consequent inability to sit during the trial of the cause, is a sufficient cause for the discharge of the jury before the return of a verdict, and for the issue of a *venire de novo* at the same or a subsequent term; and, in such case, the defendant has not been in jeopardy, within the meaning of that word, as used in either the State or Federal Constitution. *Doles v. State, 555*
22. *Same.—Murder.—Dying Declarations.—Preliminary Proof.—Discretion of Court.*—Where the defendant is charged with murder, and the State, on the trial, proposes to put in evidence the dying declarations of the deceased, and, to that end, offers the necessary preliminary proof to show the court that the declarations were made by the deceased while in *extremis* and under a solemn sense of his impending dissolution, it is in the discretion of the trial court whether it will allow the State to introduce such preliminary proof in the presence and hearing of the jury, or will send the jury out during the introduction of such proof. *Ib.*
23. *Same.—Declarations of Defendant.—Res Gestæ.*—The statements or declarations of the defendant, not made during but a short time after the transaction, in regard to the conduct of the deceased at the time, are not admissible in evidence as a part of the *res gestæ*. *Ib.*
24. *Same.—Dying Declarations.—Credibility and Weight.*—The caution and care with which dying declarations should be received and scrutinized are questions for the trial court upon the preliminary proof; but when such declarations are received and admitted, their credibility and weight as evidence are the principal questions for the jury. *Ib.*
25. *Same.—Misconduct of Jury.—Bailiff's Presence in Jury Room.—Cause for New Trial.—Counter Affidavits.*—Ordinarily, the mere presence of the jury bailiff in the jury room during their deliberations upon their verdict, when shown by affidavit, is such misconduct of the jury as will constitute a good cause for granting a new trial; but where, in a criminal cause, such misconduct is so explained and qualified by counter affidavits as to show that the defendant was not injured or harmed thereby, and the trial court so decides, the Supreme Court will respect such decision, and will not reverse the judgment on account of such misconduct. *Ib.*
26. *Same.—Severity of Punishment.—Constitutional Law.—Supreme Court.*—Where the punishment assessed against the defendant, in a criminal cause, seems excessive and oppressive, yet, if it be within the limits prescribed by the statute, the apparent severity of the judgment affords the Supreme Court no legal or sufficient ground for disturbing the finding or reversing the judgment of the trial court. *Murphy v. State, 579*
27. *Same.—Evidence.*—Unless the record shows an absolute failure of evidence to sustain the finding or verdict on some material point, the

Supreme Court is not justified, even in a criminal cause, in reversing the judgment upon the weight of the evidence. *Ib.*

28. *Same.—Reversal of Judgment.—Harmless Error.*—In a criminal cause the Supreme Court is not authorized to reverse the judgment for an error which does no harm or injury to the defendant. *Ib.*

29. *Same.—Trial by Jury.—Waiver of Constitutional Right.—Statute Construed.*—Under section 13 of the Bill of Rights in the Constitution of this State, the defendant in a criminal cause has the constitutional right to a public trial by an impartial jury, but the right is one which, under the provisions of section 1821, R. S. 1881, he may waive, except in a capital case. This section of the statute is a constitutional and valid law. *Ib.*

CUSTOM.

See BAILMENT, 2.

DAMAGES.

See CONTRACT, 8; DECEDENTS' ESTATES, 14; DRAINAGE, 5, 6, 8; FRAUD, 3; HIGHWAY; JUDGMENT, 19; NEGLIGENCE; RAILROAD, 10, 11; SLANDER, 4, 5; SUPREME COURT, 18; TRESPASS, 3; VENDOR AND VENDEE, 1.

DECEDENTS' ESTATES.

See MARRIED WOMAN, 4; MORTGAGE, 1, 8.

1. *Mortgage.—Widow's Share of Real Estate.—Application of Personal Estate.—Widow's Claim for Reimbursement.—Precedence over General Creditors.—Statutes Construed.*—B. died the owner in fee simple of four separate parcels of real estate, leaving C. as his widow. Each of the parcels was encumbered by mortgage thereon, in the execution of which C. had joined with her husband. The mortgages were foreclosed and the mortgaged real estate sold for the payment of the mortgage debts. The value of the mortgaged real estate, at the time of B.'s death, was found to be \$8,100, the one-third part of which real estate had descended to his widow in fee simple, "free from all demands of creditors," except the mortgages thereon, in the execution of which she had joined with her husband. There was in the hands of W., the administrator of the estate of B., the sum of \$4,500 in money, realized from his personal estate, to be administered, no part of which sum had been applied to the payment of the mortgages on the decedent's real estate, or on the share thereof which descended to his widow. She filed a claim for reimbursement for the value of her share of the real estate out of the moneys realized from the personal estate of B., in preference to his general creditors.

Held, that she had an equitable claim against the estate to be reimbursed the full value of her share of the lands, which had been sold and conveyed away from her for the payment of her husband's debts secured by mortgages thereon.

Held, also, that her claim for reimbursement out of the moneys realized from the personal estate and in the hands of the administrator, upon the facts of this case and the statutes of this State applicable thereto, takes precedence of, and is entitled to priority in payment over, the general debts and the claims of general creditors. *McCord v. Wright*, 34

2. *Judgment.—Complaint for Review.—Statute Construed.*—A complaint for the review of any judgment or decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, is not authorized by the statute regulating the settlement of such estates; and, in such cases, the provisions of the civil code, for the review of judgments in civil actions, are not applicable.

McCurdy v. Love, 62; *Zimmerman v. Love*, 602

3. *Agreement among Heirs.—Purchase at Administrator's Sale.—Resulting Trust.—Evidence.—Consideration.*—Where a recovery is sought upon an agreement among the heirs of a decedent, that the personal property of the estate should be bought at the administrator's sale for the benefit of the heirs, and the personal property, subsequent to the purchase, by one of the heirs, was sold by him for a price greater than that paid by him, and a share of this increase is claimed, it is necessary to show the existence of a trust, the foundation of which is the intention of the parties in an agreement made in good faith; and where no facts were alleged from which fraud could be imputed, and the evidence did not show that the purchaser had used any money of the plaintiff, or money furnished on behalf of the plaintiff, in paying for the property acquired in the name of the purchaser, no resulting trust is proved. No consideration to support a trust is shown.

Jones v. Jones, 188; Jones v. Mathey, 603

4. *Testamentary Writing.—Void for want of Attestation.*—While in life, one E. M. executed a written instrument of the following purport: "At my death, my estate shall pay to treasurer," etc., "the sum of two hundred dollars, the interest of which is to be used for the benefit of," etc. The instrument was attested by only one witness, and, after the death of E. M., was filed as a claim against her estate.

Held, that the instrument was testamentary in its character, and, as it was not attested and subscribed by "two or more competent witnesses," as required by section 2576, R. S. 1881, it could not be duly admitted to probate, and that it was, therefore, invalid as a claim against the decedent's estate, and void and inoperative for any purpose.

Moore v. Stephens, 271

5. *Appeal.—Statute Construed.*—A widow applied for an order upon the administrator of her deceased husband, requiring him to pay to her the proceeds of real estate sold to make up to her a deficit of the \$500 allowed to her by law, making parties creditors claiming the fund by reason of judgment liens. The administrator, by leave, paid the money into court, and was thereupon discharged from further costs, and as against the creditors it was, after further proceedings, ordered that the clerk pay the money to the widow.

Held, that an appeal in such case is governed by R. S. 1881, sections 2454 and 2455, which require an appeal bond within ten days, and a transcript filed within ten days thereafter. *Browning v. McCracken, 279*

6. *Claims Against.—Assets.*—Claims against an estate may be allowed without inquiring whether they belong to a preferred class, or whether there are assets to pay them.

Fickle v. Snapp, 289

7. *Same.—Legacy.—Probate Jurisdiction.—Payment of Debts.—Administrator.*—A claim for the allowance of a legacy may be presented in the court having probate jurisdiction as a claim against the estate, but if the payment of all debts against the estate is not alleged, some reason for appealing to the court for the establishment of the legacy must be shown, and also some wrong on the part of the administrator. *Ib.*

8. *Allowance of Claim.—Collateral Security.—Assignment without Recourse for Collection.—Waiver.*—An allowance of a claim against a decedent's estate is not a lien on the estate, nor can its payment be enforced by execution; and where the decedent had, in his lifetime, assigned a policy of insurance on his life to his creditor, as collateral security for the payment of his debt, the creditor does not waive his right to the proceeds of such policy by procuring an allowance of his debt as a claim against the decedent's estate in the proper court, nor by his assignment without recourse of such policy to the decedent's administrator solely for the purpose of collection. *Hight v. Taylor, 392*

9. *Same.—Evidence.*—In a suit by such creditor to recover of the decedent's

administrator the proceeds of the policy so assigned, parol evidence is competent and admissible to show that the assignment of such policy, though absolute in form, was executed by the creditor without consideration and solely for the purpose of collection. *Ib.*

10. *Claims Against.—Promissory Notes not Due.*—Under the 86th, 97th and 101st sections of the decedents' act of 1881, as amended by the act of March 7th, 1883, pp. 153, 155 and 156, promissory notes executed by the decedent, whether due or not, may be filed as claims against his estate. *Maddox v. Maddox, 537*
11. *Same.—Judgment.*—The judgment in such a case is a mere allowance of the claim to be paid in due course of administration. *Ib.*
12. *Same.—Form of Judgment.*—Where judgment was rendered against the estate, when it should have been against the administrator, under section 101, as amended, but no objection was taken to the form, or no motion made to correct it, the error will not be noticed on appeal. *Ib.*
13. *Executor.—Trespass.—Joinder of Causes.*—An executor may join in the same complaint a paragraph for trespass *quare clausum fregit* during the testator's lifetime, with another for a like trespass after his death, to lands devised to the executor in trust for specific purposes, and this is not a misjoinder. *Pittsburgh, etc., R. W. Co. v. Swinney, 586*
14. *Same.—Damages.—Chose in Action.*—The right to damages for trespass to a testator's lands during his lifetime is a chose in action for which his executor may sue. *Ib.*
15. *Same.—Parties.*—Where lands are devised to an executor in trust for certain purposes, he is the proper plaintiff in a suit for trespass thereto after the death of the testator. *Ib.*
16. *Mortgage.—Foreclosure of.—Complaint.—Personalty.—Parties.—Heirs.*—Where it appears upon the complaint for the foreclosure of a mortgage, that the personal estate of the deceased mortgagor is liable for the payment of the mortgage debt, and that the suit was brought before the expiration of a year after the issuing of letters of administration and the giving of notice thereof, a demurrer should be sustained for want of sufficient facts. *Lovering v. King, 130*
17. *Same.—Failure to Appoint Administrator.—Next of Kin.—Creditor.—Presumption.*—If the next of kin do not select an administrator, any creditor may do so; and a failure to select an administrator does not warrant the presumption that the decedent left no personal property. *Ib.*

DECLARATIONS.

See CRIMINAL LAW, 7, 22 to 24; EVIDENCE.

DEED.

See MORTGAGE, 7; PARTITION, 4; REAL ESTATE, ACTION TO RECOVER, 2; SHERIFF'S SALE, 9; TAXES, 2; VENDOR AND VENDEE, 1.

1. *Mortgage.—Description.—Evidence.—Real Estate, Action to Recover.*—A. executed a mortgage to B. upon a certain parcel of land therein described as "The west half of the northeast quarter of section nineteen, township thirty-seven north, of range five east, except twenty acres from the northeast corner of said above described tract of land, formerly deeded to Wm. Davis and Emeline Ann Davis," in Elkhart county, and, upon a decree of foreclosure, purchased the same and took possession of the north sixty acres of the west half of said quarter section. Afterwards twenty acres out of the northeast corner of said tract was, by successive deeds, conveyed from A. to C., and in an action by him against B. to recover possession of said twenty acres, the mortgage made by A. to B., a deed from A. to Amelia Davis for twenty acres off the south end of the west half of said quarter section, and parol testimony to show that no other portion of said land had

been conveyed, were admissible in evidence for the purpose of showing that the twenty acres excepted from said mortgage was not in the northeast corner of said land, but was off the south end thereof.

Lanman v. Crooker, 168

2. *Construction.—Married Woman.*—A deed of lands executed by husband and wife, made after dower was abolished, which contained a valid grant in fee of the husband's lands by him, and in the *testatum* clause words whereby his wife "relinquishes her dower in said premises," is sufficient to bar the wife's inchoate estate in the lands which would otherwise have become consummate upon his death.

Travellers Ins. Co. v. Noland, 217

3. *Adverse Possession.—Execution Defendant.—Conveyance.*—The possession of an execution defendant is not an adverse possession within the rule prohibiting the execution of deeds by the owner out of possession.

Rucker v. Steelman, 222

4. *Same.—Contract of Purchase.—Performance.*—Where possession of land is taken under an agreement, express or implied, acknowledging the title of the owner, it is not adverse. In an executory contract to purchase, the possession is not adverse, while the conditions or covenants remain unperformed. *Ib.*

5. *Condition Subsequent.—Breach.—Demand of Performance.*—A conveyance of lands provided that if the grantee should fail to use the granted premises for the manufacture of cars for a term of six consecutive months at a time, the same should revert. A complaint by the grantor alleged a breach, and that the defendant on demand refused to deliver possession.

Held, that a failure to aver demand of performance was not required, nor was it necessary to allege that the demand for possession was accompanied by notice that it was for the breach of the condition.

Held, also, that an answer alleging that the process of manufacturing was carried on in good faith, though no cars were fully completed in six months, was good.

Ellis v. Elkhart, etc., Co., 247

6. *Acknowledgment.—Evidence.—Denial of Execution Under Oath.—Burden of Issue.*—Under our statutes since 1852, a certificate of the acknowledgment of a deed in proper form makes a *prima facie* case in favor of the execution of the instrument as to the parties themselves and innocent third parties, and its introduction, or a copy thereof certified, is authorized as evidence. When a denial of the execution is made under oath, the affirmative of the question of its execution is upon the party claiming under it, and the burden of the issue so remains until its establishment to the satisfaction of the jury by such proof as will withstand and overthrow all of the evidence to the contrary.

Carver v. Carver, 497

7. *Same.—Personal Signing or by Agent.—Instruction.*—Where, under a denial of the execution of a deed, all the evidence is directed to the question of a personal signature, there is no error in the court so limiting its instructions to the jury. If instructions are desired upon the question of an execution by a person authorized to sign for the person appearing as grantor, it must be requested. *Ib.*

8. *Same.—Finding.—Non-Execution.—Notice of Claim.—Innocent Holders.*—Where the finding of the jury is that the grantor in a deed did not execute the same, it is immaterial whether persons claiming under the grantee in the deed had notice of the assumed grantor's claim of title. *Ib.*

DEFAULT.

See JUDGMENT, 3; JUSTICE OF THE PEACE, 1.

DELIVERY.

See CONTRACT, 7; PROMISSORY NOTE, 5; SALE, 1; WILLS, 4.

DEMAND.

See DEED, 5.

DEMURRER.

See DEMURRER TO EVIDENCE; HABEAS CORPUS, 1; NEGLIGENCE, 2; PLEADING, 5, 9, 10, 12, 14; PRACTICE, 4; QUIETING TITLE, 2.

DEMURRER TO EVIDENCE.

1. *Practice.*—If there is any evidence favorable to the party demurring to the evidence, it can not be considered or weighed against evidence, the tendency of which is against such party. *Wright v. Julian, 109*
2. *Same.—Inference.*—If, from the evidence, the jury might infer that the plaintiff's action should be sustained, a demurrer should be overruled, and the plaintiff should have judgment. *Ib.*

DEPOSITIONS.

See CRIMINAL LAW, 10, 11, 13, 14.

DESCENTS.

See MARRIED WOMAN, 3; MORTGAGE, 8; WILLS, 1, 5.

DESCRIPTION.

See CHATTEL MORTGAGE; DEED, 1; EXECUTION, 3.

DILIGENCE.

See DRAINAGE, 18; JUDGMENT, 10 to 12; NEW TRIAL, 1.

DISCRETION.

See CITY, 2; CONTINUANCE; CRIMINAL LAW, 15, 22; SHERIFF'S SALE, 5, 6.

DISMISSAL.

See CITY, 11; RAILROAD, 10, 11.

DONATION.

See RAILROAD, 1, 2.

DOWER.

See DEED, 2.

DRAINAGE.

1. *Assessments for.—Complaint to Enforce Lien.*—In a complaint to enforce the lien of an assessment for the expense of drainage, the commissioner charged with executing the work must, in his complaint, state facts showing a substantial compliance with the statute from the filing of the petition to the last act necessary to be performed. *Shaw v. State, 23; Buchanan v. Rader, 605*
2. *Same.—Jurisdiction of Circuit Court over Land in other Counties.*—Where lands affected by the proposed ditch, and embraced in the assessment therefor, are located in different counties, the court of the county in which the petition for the construction of the drain is filed, and where part of the land to be affected lies, has jurisdiction of all the lands assessed. *Ib.*
3. *Public Health.—Highway.—Utility.—Public Expense.*—Although proceedings for the construction of a drain under section 4273, *et seq.*, R. S. 1881, can be commenced only by an owner of land which will be benefited, this will not render the work one of private benefit only, because the granting of the petition must rest upon the ascertainment of the fact, that by the drain the public health will be improved, or one or more highways of the county or streets of a town or city will be benefited, or that the work is of public utility, and provision is also made

that when the drain is completed it shall be maintained at the public expense. *Ross v. Davis*, 79

4. *Same.—Public Use.—Equality of Benefits.*—It is not necessary in order to constitute a public use, that the whole community or any large portion thereof should participate in the use, or that all should be equally benefited. *Ib.*
5. *Same.—Constitutional Power.—Payment of Costs and Damages.—Compensation for Property.*—It is within the constitutional power of the Legislature to provide for the payment of the costs of the construction of the drain and for the damages resulting, by means of the assessment of benefits accruing to the owners, and compensation for property appropriated may be made in such benefits, or out of money realized by assessment of benefits resulting to the owners. *Ib.*
6. *Same.—Expenses.—Benefits.*—Under the statute, the costs, damages and expenses of the drainage must be less than the benefits to the owners of lands likely to be injured. *Ib.*
7. *Same.—Assessment.—Commissioners.—Contest.*—The assessment made by the commissioners may be contested. *Ib.*
8. *Same.—Taking of Property.—Payment of Damages.—Constitutional Law.—Query,* whether the statute contemplates the payment of damages before the taking of property, or whether the taking of property under the statute is a taking by the State within the constitutional provision that "No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered?" *Ib.*
9. *Same.—Title of Act.—Drainage Commissioners.*—The title, "An act concerning drainage," properly embraces legislation authorizing a board of drainage commissioners. *Ib.*
10. *Same.—Assignment of Errors.*—That the report of the drainage commissioners is not according to law is not a sufficient assignment of error. *Ib.*
11. *Same.—Trial by Jury.—Constitutional Provision.*—The statutory provision, that questions of fact shall be tried by the court, does not conflict with the constitutional requirement, that "In all civil cases, the right of trial by jury shall remain inviolate." *Ib.*
12. *Notice by Auditor.—Name of Land-Owner.—Assessment on Land.—Injunction.—Jurisdiction.*—In proceedings for the establishment of a ditch, under the drainage act of March 9th, 1875 (1 R. S. 1876, p. 428), where the name of the owner of land assessed does not appear in the notice given by the auditor, nor in any of the proceedings before the county board, jurisdiction of the person is not obtained, and the assessment on the land is void and its collection may be enjoined. *Vizzard v. Taylor*, 90
13. *Expense.—Benefit.—Constitutional Law.*—The Legislature has constitutional power to authorize and provide for the drainage of wet and overflowed lands at the expense of those whose real estate is benefited by such work. *Wishmier v. State*, 160
14. *Title of Act.—Collecting Assessments.—Attorney's Fees.*—The title of the act of April 8th, 1881 (Acts 1881, p. 397), "An act concerning drainage," is sufficient, under section 19 art. 4 of the Constitution, to include legislation directing the mode of making and collecting assessments upon lands benefited by the work, including the collection of reasonable attorney's fees. *Ib.*
15. *Same.—Complaint.—Substantial Compliance.*—A complaint to collect an assessment under such act must state facts showing that assessments were in fact made upon the defendant's land; that they were confirmed by the judgment of the court, and that the defendant was a

party to the proceedings. It should show a substantial compliance with the various provisions of the statute. This is required notwithstanding the provisions of section 8 of the act. *Ib.*

16. *Viewers.—Appointment of Surveyor.—Services.—Compensation.—Statute Construed.*—If the viewers appointed under the drainage act, section 4286, R. S. 1881, have authority to employ a surveyor, such employment is limited to the terms and purposes specified in the act. As their authority is not general, and it is at the utmost limited to the appointment, and does not authorize them to indicate the work nor fix the compensation, the statute fixes both. It does not authorize the surveyor to examine the records or prepare report of viewers.
Moon v. Board, etc., 176
17. *Same.—Petitioners.—Land-Owners.*—Section 4274, R. S. 1881, requires the petitioners for the establishment of a ditch to obtain the names of land-owners. *Ib.*
18. *Docketing Petition.—Practice.—Diligence.—Waiver.*—A petitioner for drainage, under sections 4273–4284, R. S. 1881, and amendments thereto, should fix and note on his petition a day for docketing the same; and where the court, without such endorsement, and without a finding that proper notice had been given, orders the same to be docketed, the proceedings are irregular, but if not objected to within three days after the petition is docketed, the irregularities are waived unless excuse for the delay is shown. *Smith v. Smith, 273*
19. *Same.—Report of Commissioners.—Remonstrance.*—A report of commissioners of drainage need not state when or where they met, and a statement in the remonstrance, that they “did not meet at the time and place” fixed by the court, is too indefinite. *Ib.*
20. *Same.*—No report is required as to lands not affected by the proposed work, though such lands be mentioned in the petition. *Ib.*
21. *Same.—Remonstrance.—Practice.*—A remonstrance which presents no material question may be struck out on motion. *Ib.*
22. *Complaint.—Assessment.—Exhibits.*—A complaint to enforce a ditch assessment under the act of April 8th, 1881, section 4273, *et seq.*, R. S. 1881, is insufficient upon demurrer for the want of facts, unless the assessment or a copy is filed with the complaint.
Crist v. State, ex rel., 389; Buchanan v. Rader, 605
23. *Same.—Assessment by Commissioner.*—Under such act the assessment made by the commissioner charged with the construction of the work is the basis of the action, and not the assessment made by the commissioners and reported to the circuit court. *Crist v. State, ex rel., 389*
24. *Same.—Assessment by Commissioner of Land in Different Counties.*—Under such act the commissioner charged with the construction of the ditch is authorized to make all assessments concerning it, though some assessments are made upon lands in a county other than the one where the proceeding was instituted. *Ib.*
25. *Lien for Ditch Assessments.—Complaint.—Copy of Assessment by Commissioner.—Exhibit.*—In a suit to enforce a lien for a ditch assessment under section 4275, *et seq.*, R. S. 1881, it is necessary that the assessment made by the commissioner charged with the execution of the work should be made the foundation of the suit, and either the original or a copy thereof filed as an exhibit. *Roberts v. State, 399*
26. *Notice.—Jurisdiction.—Highways.*—In proceedings for drainage under R. S. 1881, sections 4273–4284, the fact that the circuit court referred the petition to the commissioners of drainage will, as against collateral attack by persons whose lands are mentioned in the petition, be conclusive that the proper notices were posted. *Aliter* as to those who have not been named, and whose lands have not been described in the pe-

tition, and as to assessments for benefits to highways when the petition did not mention such highways. *Young v. Wells*, 410

DRUNKENNESS.

See INSURANCE, 10.

ECCLESIASTICAL LAW.

See CHURCHES.

EJECTMENT.

See DEED, 1; JUDGMENT, 19; MARRIED WOMAN, 4; QUIETING TITLE, 1; REAL ESTATE, ACTION TO RECOVER, 2; SHERIFF'S SALE, 1.

EMINENT DOMAIN.

See HIGHWAY; RAILROAD, 10, 11.

EMPLOYER AND EMPLOYEE.

See CORPORATIONS, 2; PARTNERSHIP, 2, 3.

EQUITY.

See JUDGMENT, 13 to 16; JUSTICE OF THE PEACE, 2, 3; VENDOR AND VENDEE, 2.

ESTOPPEL.

See CORPORATION, 3; CRIMINAL LAW, 14; DECEDENTS' ESTATES, 8; REPLEVIN BAIL, 4.

EVICTIION.

See VENDOR AND VENDEE, 1.

EVIDENCE.

See BAILMENT, 4; BILL OF EXCEPTIONS, 5; CHATTEL MORTGAGE; CRIMINAL LAW, 6, 7, 16, 22 to 24, 27; DECEDENTS' ESTATES, 3, 9; DEED, 1, 6, 7; DEMURRER TO EVIDENCE; INJUNCTION, 2; INSTRUCTIONS TO JURY, 5; INTOXICATING LIQUOR, 3 to 6; JUDGMENT, 2, 5, 6; MASTER COMMISSIONER; MORTGAGE, 3 to 5; PARTNERSHIP, 3, 5; PLEADING, 2, 3, 14; PRACTICE, 1, 2, 7; PROMISSORY NOTE, 13; QUIETING TITLE, 1; RAILROAD, 4, 5; REAL ESTATE, ACTION TO RECOVER, 4; REPLEVIN; REPLEVIN BAIL, 5; RES ADJUDICATA; SLANDER, 5; SUPREME COURT, 4 to 6, 9, 11, 14, 17 to 19, 23, 30, 35, 37; SURETY OF PEACE, 1, 4, 5; WITNESS.

1. *Declarations of Grantor against Title of Grantee.—Conspiracy to Defraud.*—While, as a general rule, the declarations of a grantor made after he has parted with his title are not admissible in evidence to impeach the title of one claiming under him, yet, where the grantor and grantee have conspired together to defraud third persons, the statements of either are admissible against the other. *Daniels v. McGinnis*, 549
2. *Same.—Declarations Prior to Proof of Conspiracy.*—Evidence of declarations only admissible on the ground of the existence of a conspiracy, if admitted before such proof is made, are rendered competent by the subsequent introduction of such evidence. *Ib.*
3. *Same.*—The declarations of the grantor, made prior to the time that the grantor and grantee became actors in the conspiracy, are admissible in evidence against the title of grantee. *Ib.*

EXCEPTION.

See BILL OF EXCEPTIONS; INSTRUCTIONS TO JURY, 4; SUPREME COURT, 9, 10, 14, 20, 31, 33.

EXECUTION.

See INJUNCTION; JUDGMENT, 13 to 18; MARRIED WOMAN, 3, 4; QUIETING TITLE, 5; REPLEVIN BAIL, 2; SHERIFF'S SALE.

1. *Proceedings Supplementary to.—Complaint.—Return of Execution for want of Property.—Third Party.—Statute Construed.*—The remedy of proceedings supplementary to execution, given by statute, is, in many respects, a substitute for a creditor's bill, and the complaint should show some facts rendering such proceedings necessary. The return of an execution unsatisfied must, under section 815, R. S. 1881, be alleged, and this will be sufficient cause for the proceedings under that section. To sustain such proceedings against third parties, under section 819, the complaint must show either an execution returned *nulla bona*, or, if the execution is not returned, that the execution defendant has not other property subject to execution sufficient to satisfy the judgment.
Cushman v. Gephart, 46
2. *Same.—Execution Defendant.*—Where the execution defendant is charged with having property subject to execution in the county, which he refuses to apply, and his debtor is also made a party, he may contest the sufficiency of the allegations. *Ib.*
3. *Same.—Description of Property.*—Where the only attempted description of the property sought to be reached is, that the indebtedness "is large," the complaint, perhaps, is insufficient for this cause. *Ib.*

EXECUTOR.

See DECEDENTS' ESTATES, 13 to 15.

EXEMPTION.

See SHERIFF'S SALE, 11 to 14.

EXHIBITS.

See DRAINAGE, 22, 25; PLEADING, 6, 8, 11; REAL ESTATE, ACTION TO RECOVER, 2.

FEDERAL CONSTITUTION.

See CRIMINAL LAW, 11.

FENCE.

See RAILROAD, 6, 7.

FERRYMAN.

See NEGLIGENCE, 1.

FINDING.

See JUDGMENT, 7, 8; MASTER COMMISSIONER, 4, 5; VERDICT, 1 to 3.

FINES AND FORFEITURES.

See CRIMINAL LAW, 8, 9.

FIRE INSURANCE.

See INSURANCE, 1, 2.

FORECLOSURE.

See CORPORATION, 3; DECEDENTS' ESTATES, 16; MORTGAGE.

FOREIGN LAW.

See HABEAS CORPUS, 2.

FORFEITURES.

See CRIMINAL LAW, 8, 9; INSURANCE, 3 to 10; RAILROAD, 1 to 3; STATUTE CONSTRUED.

FORGERY.

See PROMISSORY NOTE, 10; REAL ESTATE, ACTION TO RECOVER, 2.

FORMER ADJUDICATION.

See QUIETING TITLE, 1; RES ADJUDICATA.

FORMER RECOVERY.

See RES ADJUDICATA.

FRAUD.

See EVIDENCE; FRAUDULENT CONVEYANCE; CONTRACT, 9; INSURANCE, 1; JUDGMENT, 16; REAL ESTATE, ACTION TO RECOVER, 2; SALE; SHERIFF'S SALE, 1, 2, 8; VOLUNTARY ASSIGNMENT.

1. *Pleading*.—Fraud can not be pleaded generally, but the facts must be alleged. *Fry v. Day*, 348
2. *Same*.—*Misrepresentation in Execution of Lease*.—Fraud in procuring the execution of a lease is not sufficiently shown by an answer merely alleging that the plaintiff deceitfully, and to defraud the defendant, represented that it was in effect merely a receipt, and the defendant, not knowing its legal effect, signed it. *Ib.*
3. *Pleading*.—To successfully plead a fraudulent representation, damage must be averred; and such representation, to be available as a cause of action or defence, must relate to an existing or past fact. *Vogel v. Demorest*, 440

FRAUDULENT CONVEYANCE.

See EVIDENCE.

Complaint.—*Vendor and Vendee*.—*Notice*.—A complaint to set aside a conveyance as fraudulent, which fails to allege that the purchaser participated in the vendor's fraudulent purpose, but in lieu thereof avers that such purchaser agreed to pay the consideration of such purchase to a third party, and was notified of the plaintiff's claim and of the vendor's fraudulent purpose before the payment of the purchase-money, is not good unless it also avers that such third party had not accepted the promises of such purchaser, or that the same had been rescinded, in order to show that the purchaser was still indebted to the vendor. *Seager v. Aughe*, 285

GAMING CONTRACT.

See CONTRACT, 7.

GOOD-WILL.

See CONTRACT, 6.

GOVERNOR OF STATE.

See CRIMINAL LAW, 8, 9.

GRAND JURY.

See CRIMINAL LAW, 5.

GRANTOR AND GRANTEE.

See DEED; EVIDENCE.

GRAVEL ROADS.

See HIGHWAY.

HABEAS CORPUS.

See SURETY OF PEACE, 2.

1. *Petition*.—*Demurrer*.—*Motion to Quash Writ*.—An application for a writ of *habeas corpus* is not a civil action, and the sufficiency of the complaint or petition can only be questioned by a motion to quash the writ, and not by a demurrer or by the assignment in the Supreme Court, as error, of its want of sufficient facts to constitute a cause of action. *Milligan v. State, ex rel.*, 355

2. *Same.—Contract for Custody of Infant.—Corporation.—Law of Ohio.—Construction of Contract.*—The Children's Home of Cincinnati, Ohio, is a corporation organized under the laws of the State of Ohio, and as such it had the lawful charge and custody of an infant, and had power to procure for her a permanent home in a Christian family. By a written agreement, executed at the city of Cincinnati, in the State of Ohio, the Home transferred the care, custody and education of the infant, to the defendant. It is provided in the statutes, under which the Home is incorporated, that its trustees and managers might remove a child from a home, when, in their judgment, the same had become an unsuitable one, and that they should, in such case, resume the same power and authority they originally possessed. In the judgment of the trustees and managers of the Children's Home, the defendant's home had become and was an unsuitable one for the child, and he was not a proper person to have the custody and management of such child, and the Home demanded of the defendant the surrender to it of the custody and control of the child, which was by him refused. *Held*, upon the foregoing facts, that the Children's Home had the right to remove the child from the home of the defendant, and to resume its original power and authority over such child. *Ib.*

HARMLESS ERROR.

See CONTINUANCE, 1; CRIMINAL LAW, 28; INTERROGATORIES TO JURY, 2; INTOXICATING LIQUOR, 4; PLEADING, 14; PRACTICE, 7, 10; SUPREME COURT, 17, 22, 28.

HEIRS.

See DECEDENTS' ESTATES, 3, 16; MORTGAGE, 1, 8; WILLS, 1, 5.

HIGHWAY.

See DRAINAGE, 4, 26; RAILROAD, 6, 7.

Gravel Roads.—Overflow by Construction of.—Officers.—Presumption.—Jurisdiction.—County Commissioners.—Injunction.—Mandate.—Damages.—Appeal. A complaint by the owner of real estate, along one side of which a stream of water has flowed from a time immemorial, crossing a public highway, and kept from overflowing the land by a natural ridge, showed that by proceedings under the law providing for the construction of free gravel roads, the highway had been appropriated to that purpose; that work was done in constructing the gravel road, under the authority of the board of commissioners, and that the superintendent of roads, under such authority, constructed it in such a manner as to cut the natural ridge and throw the stream upon the lands, to its injury, and prayed in one paragraph for a mandate and in another for an injunction.

Held, that a case was not shown for the granting of either writ.

Held, also, that it will be presumed that the public officers did their duty, no averment of facts to the contrary being made, and the complaint stating that they assumed to act under legal authority, the county board having jurisdiction in such proceedings.

Held, also, that as section 5091, R. S. 1881, provides for assessment of damages in such cases, it must be presumed damages were awarded.

Held, also, that if the proceedings had been erroneous, the remedy was by appeal. *State, ex rel., v. Hanna, 469*

HOUSEHOLDER.

See SHERIFF'S SALE, 11.

HUSBAND AND WIFE.

See DEED, 2; INSURANCE, 7, 9; INTOXICATING LIQUOR, 1; MARRIED WOMAN; MORTGAGE, 6; QUIETING TITLE, 4; REAL ESTATE, ACTION TO RECOVER, 2, 3; WILLS, 5.

INDICTMENT.

See CRIMINAL LAW, 3, 5.

INDORSEMENT.

See DECEDENTS' ESTATES, 8, 9; PROMISSORY NOTE, 5, 6, 8 to 10.

INFANT.

See HABEAS CORPUS, 2; TAXES, 2.

INJUNCTION.

See CITY, 1, 3; DRAINAGE, 12; HIGHWAY; TAXES, 2; VENDOR AND VENDEE, 2.

1. *Execution.—Judgment.—Purchase of Land.—Complaint.*—Where a complaint to enjoin the sale of land on an execution alleged, not only that the plaintiff in the execution had receipted the same, but that the judgment had been actually paid in full and returned satisfied nearly three years before the complainant bought the land and took possession of it and paid for it, and that at the date of such purchase there was no judgment lien or other incumbrance on the property, a demurrer for want of sufficient facts should be overruled.

Whitehill v. Fauber, 169

2. *Same.—Evidence.—Parol Contract.*—In such case, an exception to parol evidence in reference to a parol contract for the purchase of the land, offered on the trial of the issues formed under such complaint, is not well taken, which states as a reason for excluding the evidence that "the complaint is based upon a written contract, and contains no allegations sufficient to authorize proof of a parol contract." *Ib.*

INSANITY.

See CRIMINAL LAW, 18, 19.

INSOLVENCY.

See MORTGAGE, 8; VENDOR AND VENDEE, 2; VOLUNTARY ASSIGNMENT.

INSTRUCTIONS TO JURY.

See DEED, 7; SLANDER, 1, 2, 4, 5; SUPREME COURT, 3, 6, 10, 17, 22, 23, 24, 28, 31, 33, 36.

1. *Request.—Objection.*—A party can not object to an instruction given at his own request. *Worley v. Moore, 15*
2. *Same.—Answer to Interrogatory.*—A judgment will not be reversed on account of an erroneous instruction, when it appears by an answer to an interrogatory that the jury were not misled. *Ib.*
3. *Legal Principles Applicable.—Conclusions Drawn from Facts.*—Where an instruction contains a correct statement of legal principles applicable to the evidence, the finding will not be disturbed, because the instruction does not apply legal principles, by stating the conclusions which should be drawn by the jury from concrete facts developed by the evidence, no such instruction having been asked. *Judd v. Martin, 173*
4. *Exceptions.*—The action of the court in giving instructions presents no question unless an exception was saved. *Lowell v. Gathright, 313*
5. *Undisputed Facts.—Effect.*—Where the evidence establishes facts, about which there is no opposing evidence or controversy, the court may instruct the jury as to the legal effect of such facts, and that they make or fail to make a case for one of the parties. *Carver v. Carver, 497*

INSURANCE.

See DECEDENTS' ESTATES, 8, 9.

1. *False Representations as to Liens.—Defence.*—In an action upon a policy of insurance against loss by fire, a paragraph of answer, wherein it is

stated that the policy was issued upon the written application of the plaintiff for the insurance, in which application he falsely represented that the buildings to be insured were free from incumbrances, when, in truth, the buildings were incumbered by the lien of certain judgments, is a good defence in bar of the action.

Leonard v. American Ins. Co., 299

2. *Same.—Charter of Company.—Power to Contract.—Mode of Contracting.—Ultra Vires.—Waiver.*—An incorporated insurance company is the creature of its charter, and where the charter gives it power to contract, and prescribes the mode or form of making such contract, the company must observe the form or mode prescribed, or the contract will be void; and in such case it is not within the power of the officers or agents of the company to waive a strict compliance with the requirements of its charter. *Ib.*
3. *Life Insurance.—Forfeiture in Case Assured shall Die from Intemperance, or in known Violation of Law.*—A provision in a policy of insurance providing that it shall be forfeited, in case the assured shall die by reason of intemperance, or while engaged in the known violation of law, is valid and enforceable. *Bloom v. Franklin L. Ins. Co., 478*
4. *Same.—Pleading.—Death of Assured Resulting from Commission of Assault and Battery.*—To a suit upon a life insurance policy, an answer, alleging in general terms, that the assured came to his death while engaged in the known violation of law by committing an assault and battery, and specifically stating facts constituting an assault and battery, is sufficient, although the term "unlawful" is not used. *Ib.*
5. *Same.—Death of Assured from Violation of Civil Law.*—It is immaterial whether the death of the assured resulted from the violation of a criminal law, or of a positive rule of civil law, provided the violation of law was such as increased the risk and naturally led to his death. *Ib.*
6. *Same.—Proximate Cause of Death.*—It is sufficient to relieve the insurance company if the known violation of law was such as to proximately lead to the death of the assured by bringing him into danger of losing his life. *Ib.*
7. *Same.—Right of Husband to Defend Wife when Assaulted.*—An assault upon the person of the wife of another is a known violation of law, and justifies the husband in interfering to protect the wife from violence. *Ib.*
8. *Same.*—It is not necessary in order to work a forfeiture, that the assured should die in the act of violating the law, but it is sufficient if it appears that the wounds received while engaged in a known violation of positive law are the cause of his death. *Ib.*
9. *Same.—Presumption.—Interference of Husband for Protection of Wife.*—The presumption is that men will act in conformity to their natural habits and propensities, and one who violently assaults the wife of another is presumed to know that he endangers his life, as the presumption is that the husband will resist the assault with force. *Ib.*
10. *Same.—Excuse.—Voluntary Drunkenness.*—The voluntary drunkenness of the assured while engaged in the known violation of law, causing his death, will not prevent a forfeiture of the policy of insurance. *Ib.*

INTENTION.

See CONTRACT, 7.

INTEREST.

See MORTGAGE, 6; PROMISSORY NOTE, 7; TRESPASS, 3.

INTERROGATORIES TO JURY.

See INSTRUCTIONS TO JURY, 2; PRACTICE, 3, 6; SUPREME COURT, 25; VERDICT, 1, 2.

1. *Bill of Exceptions*.—It is not necessary that the interrogatories and the answers of the jury thereto should be incorporated in a bill of exceptions. *Borchus v. Huntington, etc., Ass'n, 180; Boots v. Griffiths, 241*
2. *Same.—Harmless Error*.—Where it is clear that the error in propounding an interrogatory to a jury was harmless, it is not cause for reversal. *Boots v. Griffiths, 241*
3. *Same.—Opinion of Court*.—The submission of an interrogatory to the jury is not an expression of an opinion by the court upon the evidence. *Ib.*

INTOXICATING LIQUOR.

1. *Sale to Habitual Drunkard.—Notice by Wife.—Citizen.—Statute Construed*.—Section 2093, R. S. 1881, requires that the notice therein referred to, regarding the selling or giving of intoxicating liquor to a person who is in the habit of becoming intoxicated, must be given by a citizen of the township or ward in which the person referred to resides, and an averment that the wife of a citizen of such township or ward has given such notice is not sufficient. *Engle v. State, 122*
2. *Application for License.—Appeal.—Amendment of Remonstrance*.—On an appeal from a refusal by the county board to grant a license to sell intoxicating liquor in a less quantity than a quart, the circuit court may permit, at the costs of the remonstrator, an amendment making the remonstrance more specific and adding new specifications under the original objections, where no new parties are introduced. *Stockwell v. Brant, 474*
3. *Same.—Evidence.—Opinion of Witness*.—Upon the trial of such cause it is not proper for a witness to testify that in his judgment the applicant was a man fit to be trusted with a license to sell intoxicating liquors. *Ib.*
4. *Same.—Harmless Error*.—Evidence that the applicant's former place of business had been on a much frequented street was immaterial, but its admission could not harm the applicant, and is not available error. *Ib.*
5. *Same.—Former Place of Business.—Conduct of Customers*.—Testimony as to the conduct of persons congregating around the saloon formerly kept by the applicant, and going in and out, was competent, although the former place was one where liquor was sold by the quart. *Ib.*
6. *Same.—Specific Acts.—Unfitness of Applicant*.—The unfitness of applicant may be proved by specific acts. The question is not one merely of general character, but the jury may judge whether the specific acts prove unfitness in the person applying for the license. *Ib.*

JEOPARDY.

See CRIMINAL LAW, 21.

JOINDER OF CAUSES.

See DECEDENTS' ESTATES, 13; SUPREME COURT, 29.

JUDGE.

See COURTS; CRIMINAL LAW, 9; MASTER COMMISSIONER, 4.

JUDGMENT.

See COSTS, 1; CRIMINAL LAW, 9; DECEDENTS' ESTATES, 2, 11, 12; INJUNCTION, 1; JUSTICE OF THE PEACE; MARRIED WOMAN, 1; MORTGAGE, 8; PARTITION, 3; PROMISSORY NOTE, 1; QUIETING TITLE, 1; REPLEVIN BAIL; RES ADJUDICATA; SHERIFF'S SALE, 9, 10; SURETY OF PEACE, 2; VERDICT, 2, 3.

1. *Reference to Record*.—If the entry of a judgment is so obscure as not to express the final determination of the court with sufficient accuracy, reference should be had to the pleadings and to the entire record when construing the judgment. *Fleenor v. Driskill, 27*

2. *Promissory Note.--Release of Surety.--Burden of Proof.*—Where two joint makers of a note are sued, and one claims to be released because a former judgment rendered upon such note is still subsisting against his co-maker, the burden is upon him. *Robinson v. Snyder, 56*
3. *Same.—Motion to Set Aside.—Justice of the Peace.—Partnership.*—Where a judgment by default before a justice of the peace is rendered upon a partnership note against both partners, and one of them within ten days thereafter pays the costs and moves to set aside the judgment, which is done, it must affirmatively appear that such judgment was only set aside as to the person asking it; otherwise it will be deemed set aside as to both defendants. *Ib.*
4. *Same.—Entry of Judgment.—Presumption.*—The fact that the justice recites in his entry that such motion “is granted to him,” does not control the presumption that such judgment was set aside as to both defendants. *Ib.*
5. *Same.—Transcript.*—Where the transcript of a judgment and the judgment itself conflict, the latter must control, as it is the primary and best evidence of itself. *Ib.*
6. *Same.—Evidence.—Collateral Attack.*—Parol evidence is not admissible to contradict or impeach a judgment in a collateral proceeding. *Ib.*
7. *Same.—Finding and Decree.—Party to Decree.—Appeal.—Collateral Attack.*—Where the affidavit for notice by publication is defective and insufficient, but the court has thereon found and decided that the non-resident defendant was duly notified by publication of the notice of the pendency of the suit, and of the term at which the same would stand for trial, such decision and decree, although erroneous, are absolutely impervious to a collateral attack by a party to the decree, whose only remedy is an appeal to the Supreme Court, within the time and in the manner prescribed by law. *Dowell v. Lahr, 146*
8. *Motion in Arrest.—Paragraph of Complaint.—Verdict.*—A motion in arrest directed to so much of the finding as may be based upon one paragraph of a complaint will not lie, though that paragraph be bad. *Jones v. Jones, 188*
9. *Part Payment.—Agreement.—Consideration.—Accord and Satisfaction.*—The payment by A. of a part of a judgment against himself and others, upon an agreement of the plaintiff to hold A. harmless as against the judgment, is not an accord and satisfaction by A., and will not relieve him as against the whole judgment. *Fletcher v. Wurgler, 223*
10. *Review of.—New Matter.—Diligence.*—A review of a judgment for new matter discovered since its rendition will not be granted if by proper diligence such matter could have been ascertained before the trial, nor where such matter is not material. *McCauley v. Murdock, 229*
11. *Same.—Complaint.*—In such case the complaint should show by facts averred the diligence used. *Ib.*
12. *Same.—Jurisdiction.—Waiver.*—Whether new matter available only in support of a plea to the jurisdiction as to the defendant's person would be sufficient, *quære?* but in any event it would not be if other facts equally available for the same purpose were known, and no question was made as to the jurisdiction, and there was a waiver of all. *Ib.*
13. *Execution.—Real Estate.—Rights of Subsequent Purchasers.—Equity.—Marshalling Assets.*—Where a judgment is a lien upon several parcels of land which are afterwards sold to various persons at different times, a court of equity will direct its sale in the inverse order of its alienation. *Merritt v. Richey, 236*
14. *Same.—Payment.—When Extinguishment of Lien on Land First Purchased.*—Where an execution issued upon such judgment is levied upon one of the parcels subsequently sold, and the purchaser pays or purchases the

- judgment, the same must be deemed extinguished as against the prior purchaser if the land levied upon is of sufficient value to pay it. *Ib.*
15. *Same.—Title.—Sheriff's Sale.*—The judgment being thus extinguished, such subsequent purchaser can not thereafter acquire title to the prior purchaser's land by purchase under an execution issued upon such judgment. *Ib.*
 16. *Same.—Decree.—Order of Sale.*—A sale of the prior purchaser's land can not stand when the subsequent purchaser has prevented the former from obtaining an order requiring the land subject to the judgment and subsequently sold to be first offered, by promising the first purchaser to bid off the land first liable to be sold. *Ib.*
 17. *Execution.*—Execution should issue from the circuit court in which a judgment is rendered. *Shattuck v. Cox, 243*
 18. *Same.—Filing Transcript.—Sheriff's Sale.—Quieting Title.—Prayer for Relief.*—Where there is an appearance, and it is averred and found that the plaintiff's lands have been sold upon an execution issued by the clerk of V. county upon a transcript of a judgment of the circuit court of S. county, filed in the office of the clerk of V. county, there should be judgment setting aside the sheriff's sale, though that relief be not prayed. *Ib.*
 19. *Motion to Correct.—Vacate.*—If a judgment is erroneous only in respect to the damages in the recovery of real estate, the motion should be to correct that part of the judgment, and not to vacate the entire judgment. *Daniels v. McGinnis, 549*

JUDICIAL SALE.

See QUIETING TITLE, 4, 5; SHERIFF'S SALE.

JURISDICTION.

See CHURCHES; DECEDENTS' ESTATES, 7; DRAINAGE, 2, 12, 24, 26; HIGHWAY; JUDGMENT, 7, 12; JUSTICE OF THE PEACE; RAILROAD, 4.

Collateral Attack.—The jurisdiction of an inferior tribunal, so far as to preclude collateral attack, must exist both over the subject-matter and over the parties. *Vizzard v. Taylor, 90*

JUROR.

See CRIMINAL LAW, 21.

JURY.

See CRIMINAL LAW, 17 to 22, 25, 29; DRAINAGE, 11; INSTRUCTIONS TO JURY, 2; MANDAMUS.

JUSTICE OF THE PEACE.

See JUDGMENT, 3, 4; LANDLORD AND TENANT; SURETY OF PEACE.

1. *Attachment.—Publication against Actual Resident.—Motion to Set Aside Judgment.—Appeal.—Jurisdiction.*—Where proceedings in attachment were instituted before a justice of the peace against a resident of this State, and upon an affidavit of non-residence publication was made and judgment entered on default, the judgment can not be set aside by the justice, upon a motion founded upon an affidavit of residence and want of notice, made after the time fixed by statute within which such motion must be made had expired; nor can the circuit court acquire jurisdiction of the matter by an appeal from the refusal of the justice. *Brown v. Goble, 86*
2. *Same.—Void Judgment.—Relief in Equity.*—A person against whom a judgment is rendered, valid only on its face, is entitled to be relieved from it, although the judgment is in fact void, but a justice of the peace has not the jurisdiction in an equity proceeding to grant such relief. *Ib.*

3. *Same.*—In the decision of cases within their jurisdiction justices of the peace should act upon established principles of equity, but they can not assume jurisdiction of suits in equity. *Ib.*

LANDLORD AND TENANT.

See FRAUD, 2.

Holding Over.—Suit for Possession.—Complaint.—Lease.—Justice of the Peace.—

A complaint against a tenant holding over, to recover possession and damages, before a justice of the peace, which avers a lease for a definite time, and that it has expired, and that the defendant refuses to surrender possession, sufficiently shows an unlawful detention of the premises, to be good after verdict. *Fry v. Day, 348*

LAW OF THE CASE

See STARE DECISIS.

LEASE.

See FRAUD, 2.

LEGACY.

See DECEDENTS' ESTATES, 7.

LEGISLATURE.

See CRIMINAL LAW, 10; DRAINAGE, 5.

LICENSE.

See INTOXICATING LIQUOR, 2 to 6; RAILROAD, 10.

LIEN.

See DRAINAGE, 1, 25; INSURANCE, 1; JUDGMENT, 13 to 16; MORTGAGE, 7; QUIETING TITLE, 1, 4; REPLEVIN BAIL, 4; SHERIFF'S SALE, 9, 10.

LIFE INSURANCE.

See INSURANCE, 3 to 10.

LIMITATION OF ACTIONS.

See MARRIED WOMAN, 4; RAILROAD, 10.

LIQUOR LAW.

See INTOXICATING LIQUOR.

MALICE.

See SLANDER, 2, 3.

MALICIOUS TRESPASS.

See TRESPASS.

MANDAMUS.

See HIGHWAY.

Issue of Fact.—Right of Trial by Jury.—An issue of fact, in mandate, must be tried by jury if either party demands it, the proceeding being at law, and not in equity. *State, ex rel., v. Burnsville T. P. Co., 416*

MANUFACTURING COMPANY.

See CORPORATIONS, 2.

MARRIAGE.

See WILLS, 5.

MARRIED WOMAN.

See DEED, 2; INTOXICATING LIQUOR, 1; MORTGAGE, 6; QUIETING TITLE, 4; REAL ESTATE, ACTION TO RECOVER, 2; WILLS, 5.

1. *Judgment*.—A judgment against a married woman is valid as against collateral attack. *Wright v. Wright, 444*
2. *Same*.—*Parties*.—*Statute Repealed*.—Section 5129, R. S. 1881, which required that suits concerning the lands of a married woman should be prosecuted by or against the husband and wife jointly, is repealed as to suits in her behalf, by section 254. *Ib.*
3. *Same*.—*Descent*.—*Sheriff's Sale*.—*Statute Construed*.—Section 2484, R. S. 1881, prevents the sale on execution against a married woman, during her second marriage, of lands held by her in virtue of a previous marriage, if she have children alive by such marriage. *Ib.*
4. *Same*.—*Real Estate, Action to Recover*.—*Limitation of Action*.—*Decedents' Estates*.—A suit by a woman to recover lands sold on execution against her while married is barred if brought after the lapse of ten years, and after two years from the death of her husband. *Ib.*

MARSHALLING ASSETS.

See JUDGMENT, 13 to 16.

MASTER COMMISSIONER.

1. *Evidence*.—*Bill of Exceptions*.—*Practice*.—Evidence admitted before a commissioner is not before the court unless preserved by bill of exceptions or by the commissioner in his report. *Borchus v. Huntington, etc., Ass'n, 180*
2. *Same*.—*Testimony*.—*Record*.—A motion to make the testimony taken before a commissioner part of the record must be made before the court, on request, has acted upon the report and made a finding and judgment. *Ib.*
3. *Same*.—*Report*.—*Waiver*.—Where the cause was referred to a special commissioner to report the facts and the evidence, and the facts alone were reported, the court might, on motion, or at its own instance, have required the commissioner to report the evidence; but where such action was not taken the error is waived. *Ib.*
4. *Same*.—*Evidence before Commissioner*.—A judge has no power to sign a bill of exceptions containing evidence taken before a commissioner, but not brought before the court in a proper manner, and which was not before the court when the court made its finding upon the facts as reported by the commissioner. *Ib.*
5. *Same*.—*Submission to Court*.—*Conclusions of Law*.—Where the commissioner reports his facts without the evidence, and the issues are submitted to the court for trial upon the findings, the court can not be required to state conclusions of law thereon, and such conclusions, if stated, are surplusage. *Ib.*

MEASURE OF DAMAGES.

See SLANDER, 4; TRESPASS, 3.

MISTAKE.

Voluntary Payment.—Where one party is trusted to make the calculation of interest upon notes due him, and he assures the debtor that the statement is correct, although it is in fact erroneous, and the statement is accepted, the mistake is a mutual one, and the creditor having received more than the sum actually due, he can be called to account for the excess. *Worley v. Moore, 15*

MORTGAGE.

See CHATTEL MORTGAGE; CORPORATION, 3; DECEDENTS' ESTATES, 1; DEED, 1; PLEADING, 6; REAL ESTATE, ACTION TO RECOVER, 2; SHERIFF'S SALE, 1.

1. *Foreclosure of.—Complaint.—Decedents' Estates.—Personalty.—Parties.—Heirs.*—Where it appears upon the complaint for the foreclosure of a mortgage, that the personal estate of the decedent mortgagor is liable for the payment of the mortgage debt, and that the suit was brought before the expiration of a year after the issuing of letters of administration and the giving of notice thereof, a demurrer should be sustained for want of sufficient facts. *Loving v. King, 130*
2. *Same.—Failure to Appoint Administrator.—Next of Kin.—Creditor.—Presumption.*—If the next of kin do not select an administrator, any creditor may do so; and a failure to select an administrator does not warrant the presumption that the decedent left no personal property. *Ib.*
3. *Foreclosure.—Evidence.—Letters.—Payment.—Receipt.*—Where real estate was sold and notes and mortgage given for purchase-money, and the property transferred and laid off in lots, and a portion resold and bonds and notes taken upon such sales, it was proper under an answer of payment, on trial of the foreclosure suit, the principal owner of the property being dead, to permit the introduction in evidence of a letter from the father of the deceased, to the plaintiff, enclosing a receipt by the plaintiff's attorney to the deceased for a sum of money in excess of the amount of the mortgage debt, said sum having been paid at the request of the plaintiff, and the letter connecting the payment with the mortgage and being admitted with other evidence in relation to the transactions of the parties. *Cook v. Woodruff, 134*
4. *Same.—Examination of Plaintiff as Witness.—Letters of Agent of Defendant.—Death of Principal Defendant.*—It was also proper, while the plaintiff was under examination by the defendants as a witness on their behalf, to allow the introduction of letters to the plaintiff from one acting as agent of the principal owner before his death, and himself interested in the mortgaged property, in regard to the sale of the lots and the application of the proceeds upon the mortgage debt. The letters were relevant, and the plaintiff, being upon the witness stand, had full opportunity for explanation, and if the letters were immaterial he could not be injured by their introduction. The principal owner being dead, and the defendants, relying chiefly upon the testimony of the plaintiff, aided by such additional evidence as they could find, were entitled to a liberal use of such evidence as was in any way competent and relevant to the issue. *Ib.*
5. *Same.—Application of Proceeds of Sales.*—Proof having been introduced that an arrangement had been made with plaintiff, that he was to receive the proceeds of lots sold and to release a lot from the lien of the mortgage for every one thousand dollars received, and a large amount of such proceeds being received in bonds, the defendants were entitled to examine the plaintiff as to his application of money subsequently received upon such bonds. So, also, the plaintiff was subject to an examination in regard to an indemnifying bond executed by parties in interest to secure the payment of the bonds received on the sale of the lots. *Ib.*
6. *Foreclosure.—Notes for Purchase-Money.—Alteration.—Consent of Husband.—Defence by Wife.—Answer.—Reply.*—In a suit to foreclose a mortgage given to secure notes for the purchase-money of the mortgaged property, the wife of the mortgagor, who had joined in the mortgage, answered that after the execution of the mortgage, the payee of the notes unlawfully, and without her knowledge, fraudulently altered the notes executed by her husband, by inserting a provision that the notes were to bear ten per cent. interest from maturity. To this the plaintiff replied that the alteration was made in the presence, and by the direction and agreement, of the maker.
Held, that as the answer was pleaded as a defence to the entire debt se-

cured by the mortgage, and as the wife owned no interest in the real estate, inchoate or otherwise, as against the mortgagee, the debt being for purchase-money of the property, the reply was sufficient.

Bowman v. Mitchell, 155

7. *Sale Subject to Part of Debt.—Error in Record.—Liability of Recorder.—Vendor's Lien.—Subrogation.*—A. mortgaged land to B., and the mortgage was duly recorded. A. subsequently sold the land to C., who, as part of the purchase-money, agreed to pay \$500 of the mortgage debt to B., the agreement being recited in the deed to C., but the record of the deed only stating the amount assumed as \$200, and the property was conveyed by C. to D., and C. afterwards died insolvent, leaving A. to pay the mortgage debt.

Held, that the recorder and the sureties on his official bond were liable to A. for his failure to record the deed properly.

Held, also, that A. could enforce a vendor's lien against D. for \$200 and interest.

Held, also, that A. was subrogated to the rights of B., and could have enforced the lien in his right. In equity D. was the principal and A. the surety, and A. having paid the debt, became entitled to the security held by the creditor.

Lowry v. Smith, 466

8. *Foreclosure.—Insolvent Decedent.—Heirs.—Child and Widow.—Sale by Administrator.—Cross Complaint.—Quieting Title.*—N. K. died insolvent seized in fee of lands, leaving, surviving him, a child, and also a childless widow, who had been the second wife of decedent and was still living. The administrator sold, under the order of the court, "all the estate which said N. K. had in said land liable to be sold for the payment of his debts, amounting to two-thirds of the fee, and no more." The land was subsequently sold by the purchaser at the administrator's sale, and a mortgage given to secure the purchase-money; suit to foreclose the mortgage.

Held, that the child sustained no substantial injury by the refusal of the court to permit such child to assert a claim, by way of cross complaint, to an interest in the land as heir, and have her title quieted.

Held, also, that the interest sought to be subjected to the foreclosure proceedings did not include the widow's interest in the land, but only such interest as passed under the administrator's sale.

Held, also, that if the order of the court had included the interest of the widow, such order would have been void. *Wimberg v. Schwegeman*, 528

MUNICIPAL CORPORATION.

See CITY; COUNTY COMMISSIONERS; RAILROAD, 2.

MURDER.

See CRIMINAL LAW, 6, 7, 22.

NAME.

See CRIMINAL LAW, 3; DRAINAGE, 12, 17; PARTNERSHIP, 1, 4, 5; PROMISSORY NOTE, 12; RAILROAD, 9.

NEGLIGENCE.

See BAILMENT; RAILROAD, 8.

1. *Common Carrier.—Ferryman.*—Where one engaged in the business of a ferryman for hire receives for transportation a wagon and horses in charge of a driver, the responsibility of the ferryman is not that of a common carrier in exclusive custody of goods, but he is liable for injury occurring through his neglect to provide reasonably safe and convenient means for the departure of horses and vehicles from the boat, the driver being without fault contributing to the injury.

Yerkes v. Sabin, 141

2. *Complaint.—Demurrer.—Motion.*—Where the complaint, in an action for the recovery of damages resulting, as alleged, from the negligence of the defendant, charges such negligence and consequent damages in general terms, and the defendant desires to object thereto for the want of certainty, such objection can not be made available by a demurrer for the want of facts, but only by a motion to make the charge more specific. *Evansville v. Worthington, 282*

NEW TRIAL.

See BILL OF EXCEPTIONS, 2; CRIMINAL LAW, 25; PARTNERSHIP, 3; PRACTICE, 2; SUPREME COURT, 2, 3, 12, 34, 37.

1. *Surprise.—Witness.—Diligence.*—A motion for a new trial on account of surprise at the testimony of a witness must be supported by the affidavit of the party showing diligence, and that he was, in fact, surprised by the testimony of the witness. *Dowell v. State, 310*
2. *Joint Motion.*—A joint motion for a new trial will be overruled if not well taken as to all joining therein. *Carver v. Carver, 497*
3. *Bill of Exceptions.—Supreme Court.*—A cause for a new trial is not taken as true, and will not be considered by the Supreme Court unless the truth of the facts, assigned as such cause, is shown by bill of exceptions. *Sweetser v. McCrea, 406*

NOMINAL DAMAGES.

See VENDOR AND VENDEE, 1.

NON-RESIDENT.

See COSTS, 2; JUDGMENT, 7; NOTICE, 2.

NOTICE.

See COURTS, 1; DEED, 8; DRAINAGE, 12, 26; FRAUDULENT CONVEYANCE; INTOXICATING LIQUOR, 1; JUDGMENT, 7; JUSTICE OF THE PEACE, 1; PROMISSORY NOTE, 8, 9.

1. *Constructive.—Actual.*—Where the statute provides for constructive notice, a strict compliance with the statute as to the mode of giving such notice is essential. Actual notice will not supply any material deviation in the publication from what the statute prescribes. *Vizzard v. Taylor, 90*
2. *Non-Resident Defendant.—Affidavit for Publication.—Statute Construed.*—Under the provisions of section 318, R. S. 1881, in an action against a non-resident defendant, to whom notice of the pendency of such action, and of the term at which the same will stand for trial, is to be given by publication in a newspaper, the affidavit for publication should show not merely the non-residence of the defendant, but also that, in the case wherein it is filed, a cause of action exists against such defendant, or that he is a necessary party to such action in relation to real estate. *Dowell v. Lahr, 146*

OBSTRUCTING LEGAL PROCESS.

See CRIMINAL LAW, 2.

OFFICE AND OFFICER.

See CITY, 9, 10; COUNTY COMMISSIONERS; DRAINAGE, 7, 9, 16, 24; HIGHWAY; MORTGAGE, 7; PRESUMPTION; SHERIFF'S SALE; TAXES, 2.

OPEN AND CLOSE.

See PRACTICE, 5.

OPINION.

See CRIMINAL LAW, 18 to 20; INTOXICATING LIQUOR, 3.

PARDONS.

See CRIMINAL LAW, 8, 9.

PARENT AND CHILD.

See HABEAS CORPUS, 2; MORTGAGE, 8.

PARTIES.

See DECEDENTS' ESTATES, 15, 16; EXECUTION, 2; JUDGMENT, 7; MARRIED WOMAN, 2; MORTGAGE, 1.

PARTITION.

1. *Title*.—Proceedings in partition create no new title, but, ordinarily, simply divide the land as held under existing titles into separate shares. *Fleenor v. Driskill*, 27
2. *Same*.—*Interlocutory Order*.—It is by the interlocutory order that the rights and interests of the parties in suits for partition are adjusted. *Ib.*
3. *Same*.—*Order of Sale*.—*Appeal*.—An order for the sale of land in a partition proceeding is a final order, from which an appeal may be taken. *Ib.*
4. *Payment of Purchase-Money*.—*Equitable Title*.—*Deed*.—Under section 1202, R. S. 1881, a purchaser is not entitled to a deed of conveyance until the purchase-money is paid; he merely acquires by his purchase an equitable title to the land, without any right of possession. *Deputy v. Mooney*, 465

PARTNERSHIP.

See JUDGMENT, 3; PROMISSORY NOTE, 12.

1. *Use of Firm Name by Purchaser of Business*.—*Liability of Prior Member to Creditors*.—Where one is engaged in business under a firm name, and under such name purchases goods for such business from the plaintiffs from time to time, and afterwards sells the business and property to a son, who thereafter continues such business under such name, and under such name purchases similar goods from the plaintiffs, who have no knowledge of such sale and transfer, the former is liable to the plaintiffs for the goods thereafter purchased by the son from them under such name. *Elverson v. Leeds*, 556
2. *Contract by One Member*.—*Liability of Firm*.—A contract by one partner to pay an employee stipulated wages binds such partners to pay for such services as may thereafter be rendered under such contract, though some of such services were rendered after a third person had become a co-partner in carrying on the business of the firm. *Froun v. Davis*, 401
3. *Same*.—*Evidence*.—*Payment*.—*New Trial*.—As the formation of such firm constitutes no defence for services thereafter rendered under such contract, and where, in an action therefor, under a plea of payment, the evidence fails to show that the services had been fully paid, a new trial will be granted. *Ib.*
4. *Promissory Note*.—*Complaint*.—A complaint which contains a copy of a note, and in effect alleges that the defendants, by the name affixed to the note, executed it to the plaintiffs by the name by which the payees were designated in the note; that said note is due and unpaid, is sufficient. It was not necessary to allege the firm name and style in which the plaintiffs or defendants did business, but the averments did not vitiate. *Lucas v. Baldwin*, 471
5. *Same*.—*Denial of Execution by One Partner*.—*Evidence of Authority*.—In an action against two or more on a note, one of the defendants may deny for himself, under oath, its execution, and if the note was made by a partner of that defendant, the answer would require proof that the giving of the note was within the authority of the partner, acting in the business of the partnership. *Ib.*

PAYMENT.

See JUDGMENT, 9, 14; MISTAKE; MORTGAGE, 3; PARTITION, 4; PARTNERSHIP, 3.

PERFORMANCE.

See DEED, 4, 5.

PERSONAL PROPERTY.

See BAILMENT; CHATTEL MORTGAGE; DECEDENTS' ESTATES, 1, 16; MORTGAGE, 1, 2; WILLS, 1 to 4.

PLEADING.

See CORPORATION, 1; CRIMINAL LAW, 1 to 5; DEED, 5 to 8; DRAINAGE, 1, 15, 22, 25; EXECUTION, 1, 3; FRAUD, 3; FRAUDULENT CONVEYANCE; HABEAS CORPUS, 1; INJUNCTION; INSURANCE, 4; JUDGMENT, 1, 8, 11, 18; LANDLORD AND TENANT; MORTGAGE, 1, 6, 8; NEGLIGENCE, 2; PARTNERSHIP, 4, 5; PRACTICE, 4, 5; PROMISSORY NOTE, 12, 13; QUIETING TITLE, 2 to 4; RAILROAD, 3, 8, 9; REAL ESTATE, ACTION TO RECOVER, 2 to 4; SHERIFF'S SALE, 1, 4, 6, 11 to 14; SLANDER, 8; SUPREME COURT, 15, 24; SURETY OF PEACE, 4; TAXES, 1; TRESPASS, 1.

1. *Amended Complaint.—Date.*—An amended complaint is to be held as stating the cause of action as it existed when the suit was instituted.
Worley v. Moore, 15
2. *Proof.—Time.—Materiality.*—Time is not in itself ordinarily material in a pleading, but may be so as a means of identifying a particular transaction and limiting the damages to the injury caused thereby.
Western, etc., Co. v. Kilpatrick, 42
3. *Same.—Evidence.—Telegraph.*—Where a complaint to recover the statutory penalty for failing to promptly send a telegraphic dispatch alleges that the dispatch was sent in March, it is not error to permit evidence that it was sent in January.
Ib.
4. *Answer in Confession and Avoidance.*—An answer in confession and avoidance is good if the facts show there was no such wrong as alleged in the complaint.
Bottenberg v. Nixon, 106
5. *Demurrer.—Capacity to Sue.*—A demurrer questioning the sufficiency of a complaint does not present any question as to the plaintiff's capacity to sue.
Borchus v. Huntington, etc., Association, 180
6. *Exhibits.—Building Association.—Mortgage.*—A complaint by a building association to foreclose a mortgage need not exhibit a copy of its constitution and by-laws, and, if it does so, such exhibits will not be considered as part of the complaint. *Newman v. Ligonier, etc., Association, 295*
7. *Same.—Set-Off.—Striking out.—Practice.*—An answer which sets up a valid set-off should not be struck out, though it contains also much other matter which is wholly idle or surplusage.
Ib.
8. *Complaint.—Exhibits.—Reforming Instrument.*—A complaint to reform a written instrument, which does not contain or exhibit the original or a copy thereof, is bad on demurrer. *Cottrell v. Aetna L. Ins. Co., 311*
9. *Same.—Demurrer.*—A complaint sufficient for some relief is not bad because not sufficient for all the relief prayed.
Ib.
10. *Same.—Construction.—Theory.*—When it appears by the prayer and whole tenor of a pleading, that it was formed on a definite theory, and it is insufficient on that theory, it will be held bad on demurrer, though the facts averred may be sufficient upon a different theory.
Ib.
11. *Written Instrument.—Copy.*—Under section 362, R. S. 1881, it is only where a pleading is founded on a written instrument that "the original, or a copy thereof, must be filed with the pleading."
Hight v. Taylor, 392

12. *Demurrer.—Joint and Several.*—A demurrer which recites that "The defendants separately and severally demur to the first and second paragraphs of the plaintiff's complaint, and for cause of demurrer say that neither of said paragraphs states facts sufficient to constitute a cause of action against them," is a separate demurrer as to each paragraph, but joint as to the parties defendants. *Carver v. Carver*, 117
13. *Same.—Construction.—Defendant Named.*—Where a particular defendant is last named in a paragraph of a complaint, and in a succeeding paragraph the words "the said defendant" are used, without other designation, it will be held that the reference is to the defendant last named. 112
14. *Demurrer.—Practice.—Evidence.—Harmless Error.*—Where a demurrer is sustained erroneously to a complaint in a single paragraph, stating the facts specifically, and afterwards another paragraph more general is filed upon which there is issue, and upon the trial of which the facts stated in the original would have been admissible in evidence, the error can not be held harmless, it being presumed, nothing appearing to the contrary, that the case was tried upon the erroneous theory of law as held in sustaining the demurrer. *Travellers Ins. Co. v. Noland*, 217

POSSESSION.

See DEED, 3, 4, 5; LANDLORD AND TENANT; PARTITION, 4; QUIETING TITLE, 1; RAILROAD, 10, 11; REAL ESTATE, ACTION TO RECOVER; REPLEVIN; VENDOR AND VENDEE, 1.

PRACTICE.

- See BILL OF EXCEPTIONS; CONTINUANCE; CRIMINAL LAW, 1, 15; DECEDENTS' ESTATES, 5, 12; DEED, 6, 7; DRAINAGE, 18, 21; HABEAS CORPUS, 1; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JUDGMENT, 1 to 3, 7, 8, 19; MASTER COMMISSIONER; NEGLIGENCE, 2; NEW TRIAL; PLEADING, 5, 7, 14; PROMISSORY NOTE, 1; QUIETING TITLE, 5; SLANDER, 5; SUPREME COURT; VERDICT; WITNESS.
1. *Specific Objections to Evidence.—Bill of Exceptions.*—Specific objections to evidence must be stated to the trial court, and these objections must be set forth in a bill of exceptions, to present any question to the Supreme Court. *Bottenberg v. Nixon*, 106
 2. *Evidence.—New Trial.*—A finding on the evidence can only be reviewed where there is a motion for a new trial. *Moon v. Board, etc.*, 176
 3. *Motion to Strike Out Interrogatories.—Bill of Exceptions.*—A motion to strike out interrogatories, and the ruling thereon, must be embraced in a bill of exceptions to save the question on appeal. *Borchus v. Huntington, etc.*, App'n, 180
 4. *Amendment.—Demurrer.*—An amendment of a pleading, after a demurrer to it has been sustained, takes the original out of the record, and no error can be assigned upon the ruling on the demurrer. *Whitenides v. Hunt*, 191
 5. *Same.—Open and Close.*—Complaint by a commission merchant, for commissions and advances made in the purchase of wheat for the defendant. Answer, that no wheat was purchased, but the transaction was a gaming contract and wager upon the future price of wheat. Reply, general denial.
Held, that the plaintiff had the open and close. *Ib.*
 6. *Answer to Interrogatories.*—The court may, under the code, strike out the defendant's answer if he fail to answer interrogatories as ordered, in the absence of a sufficient excuse shown. *Fitch v. Citizens, etc., Bk.*, 211
 7. *Evidence.—Harmless Error.*—The refusal to admit further evidence upon a point concerning which there is no real controversy, and which is clearly established, is a harmless error. *Trees v. Shannon*, 353

8. *Change of Venue.—Argument of Counsel.*—It is not proper for counsel to comment upon a change of venue, before the jury, but the error is not available if counsel desist on objection made. *Worley v. Moore, 15*
9. *Negligence.—Complaint.—Demurrer.—Motion.*—Where the complaint, in an action for the recovery of damages resulting, as alleged, from the negligence of the defendant, charges such negligence and consequent damages in general terms, and the defendant desires to object thereto for the want of certainty, such objection can not be made available by a demurrer for the want of facts, but only by a motion to make the charge more specific. *Evansville v. Worthington, 282*
10. *Demurrer.—Harmless Error.*—The sustaining of a demurrer to a good paragraph of pleading is harmless error, if, under another paragraph remaining the same facts are admissible in evidence. *Hodgson v. Board, etc., 604*

PRESUMPTION.

See COSTS, 1; COURTS, 2, 3; DECEDENTS' ESTATES, 17; HIGHWAY; INSURANCE, 9; JUDGMENT, 4; MORTGAGE, 2; PLEADING, 14; REPLEVIN; SHERIFF'S SALE, 12; SLANDER, 3; SUPREME COURT, 35, 36.

Public Office.—The presumption is always in favor of that which is ordinarily and usually done in like cases. A public officer is presumed to have done his duty. *Baker v. Merriam, 539*

PRINCIPAL AND AGENT.

See CONVERSION; COUNTY COMMISSIONERS, 2; DEED, 7; INSURANCE, 2; MORTGAGE, 4.

PRINCIPAL AND SURETY.

See JUDGMENT, 2; MORTGAGE, 7; PROMISSORY NOTE, 6, 8, 11; REPLEVIN BAIL.

PRIVATE WAY.

See RAILROAD, 6.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION.

PROMISE.

See FRAUDULENT CONVEYANCE; SHERIFF'S SALE, 2.

PROMISSORY NOTE.

See CORPORATIONS, 1; DECEDENTS' ESTATES, 10; JUDGMENT, 2; MORTGAGE, 6; PARTNERSHIP, 4, 5; WILLS, 3, 4.

1. *Joint Makers.—Personal Defence.—Judgment against One.—Puis Darrein Continuance.*—Where one of two makers of a joint promissory note succeeds in a defence personal to himself, and not involving the merits of the action, against both of the makers, and upon appeal the judgment in his favor is reversed, he can not upon a new trial escape liability under a plea *puis darrein continuance*, alleging that a judgment has been taken in such action against his co-defendant, which still remains in force. *Lawrence v. Sample, 53*
2. *Payable to Order or Bearer.—Commercial Paper.—Statute Construed.*—A promissory note payable to a designated person or bearer, or payable to bearer, is a valid promissory note, and when payable at a bank in this State is, under our statute, protected as commercial paper in the hands of a *bona fide* holder. *Melton v. Gibson, 158*
3. *Same.—Definition.*—The statute does not define what is a valid promissory note, but accepts the instruments so defined by the common law. *Ib.*

4. *Same.—Payable at Bank.—Bearer.*—A promissory note, valid at common law, is so under our statute, but is not negotiable under the law merchant unless payable at a bank in this State. That it is transferable by delivery does not affect its negotiability under the statute. *Ib.*
5. *Same.—Indorsement.—Delivery.*—Section 5501, R. S. 1881, authorizes the assignment of all classes of choses in action by endorsement, but does not require an endorsement, where the instrument in terms authorizes a transfer by delivery. *Ib.*
6. *Want of Consideration.—Surrender of Cause of Action.—Extension of Time.—Chattel Mortgage.—Execution of New Notes Payable in Bank.—Agreement.*—Where A. executed three promissory notes not negotiable by the law merchant to B., without consideration, and B. endorsed them to C. for value, and when the notes became due, upon B. undertaking to execute, and subsequently executing, a chattel mortgage to secure A., he became a joint maker with B. of three promissory notes for a like sum as the original notes, the new notes being payable to C. at a bank in this State at a future time;
Held, that admitting that A. might have defended successfully a suit by C. upon the three original notes, for want of consideration, as provided by section 5503, R. S. 1881, yet, as C. had a good cause of action against B. upon his endorsement, the loss of this right, and the surrender of the notes, constituted a sufficient consideration for the execution by A. of the new notes as surety for B.
Held, also, that the granting of the extension of time to B. for a definite period was a sufficient consideration for the execution by A. of the new notes as surety for and with B.
Held, also, that the execution of the chattel mortgage, in pursuance of the agreement therefor, if A. would sign, furnished a sufficient consideration moving to A. for his execution of the notes as surety.
Judd v. Martin, 173
7. *Condition.—Interest.—Attorney's Fees.*—A promissory note conditioned that interest shall be compounded if not paid at maturity, and stipulating that five per cent. attorney's fees shall be paid, does not make the payment of attorney's fees conditional. *Fitch v. Citizens, etc., Bank, 211*
8. *Same.—Endorser.—Surety.—Notice of Non-Payment.*—One who endorses a note as surety for the maker is not entitled to notice of non-payment. *Ib.*
9. *Same.—Waiver of Notice.*—Where a note payable at bank contains a waiver by the endorser of notice of protest for non-payment, notice of non-payment is waived by the endorser. *Ib.*
10. *Assignor and Assignee.—Consideration.—Forged Note.*—In a suit upon a note payable in bank brought by an assignee in good faith before maturity, the fact that the consideration of the note was the assignment by the payee to the maker of a forged note, is no defence.
McCauley v. Murdock, 229
11. *Consideration.—Surrender of Prior Note.—Principal and Surety.*—As between the principal and the payee of a promissory note, the surrender by the latter to the former of his prior valid note, for the same amount, is a sufficient consideration for the new note; and where the consideration is sufficient, as between the payee and principal, it is sufficient, also, as between the payee and surety in such new note.
Brewster v. Baker, 260
12. *Complaint.—Partnership.—Name.*—A complaint which contains a copy of a note, and in effect alleges that the defendants, by the name affixed to the note, executed it to the plaintiffs by the name by which the payees were designated in the note; that said note is due and unpaid, is sufficient. It was not necessary to allege the firm name and style in which the plaintiffs or defendants did business, but the averments did not vitiate.
Lucas v. Baldwin, 471

13. *Same.—Denial of Execution by One Partner.—Evidence of Authority.*—In an action against two or more on a note, one of the defendants may deny for himself, under oath, its execution, and if the note was made by a partner of that defendant, the answer would require proof that the giving of the note was within the authority of the partner, acting in the business of the partnership. *Ib.*

PUBLIC INDECENCY.

See SLANDER, 6, 7.

PUBLICATION.

See JUDGMENT, 7 ; JUSTICE OF THE PEACE, 1 ; NOTICE.

PUIS DARREIN CONTINUANCE.

See PROMISSORY NOTE, 1.

QUIETING TITLE.

See JUDGMENT, 18 ; MORTGAGE, 8 ; REAL ESTATE, ACTION TO RECOVER, 3.

1. *Ejectment.—Evidence.—Effect of Decree Quieting Title.—Res Adjudicata.—Taxes.—Lien.*—A decree in favor of one out of possession against one in possession, quieting the title of the former free from all claims of the latter except a lien for taxes, is proper evidence for the former against the latter in a subsequent suit for the possession, and concludes the latter not only as to the title, but as to any right of possession not afterwards acquired. *Farrar v. Clark, 447*
2. *Complaint.*—A complaint to quiet title which states the specific facts upon which plaintiff's title rests, and thereby discloses that the defendant has an interest, is bad on demurrer, though it be also alleged generally that the plaintiff "holds the land in law and equity discharged of and free from all claims and liens of" the defendant. *Ragsdale v. Mitchell, 458*
3. *Same.—Statement of Title.*—Where a pleader specifically describes the title upon which the right to recover is based, he must recover on the title described, and the specific description of title can not be controlled by a conclusion of law. *Ib.*
4. *Same.—Bankruptcy.—Wife's Interest.—Judicial Sale.*—A complaint against the wife of a bankrupt to quiet title, which shows a sale of lands of the bankrupt to the plaintiff by order of the bankruptcy court to satisfy liens thereon, the wife not being a party to the order of sale, shows that the wife has an interest in the lands, and is, therefore, bad. *Ib.*
5. *Transcript.—Execution.—Sheriff's Sale —Prayer for Relief.*—Where there is an appearance, and it is averred and found that the plaintiff's lands have been sold upon an execution issued by the clerk of V. county upon a transcript of a judgment of the circuit court of S. county, filed in the office of the clerk of V. county, there should be judgment quieting the plaintiff's title, though that relief be not prayed. *Shattuck v. Cox, 242*

RAILROAD.

1. *Tax Aid.—Donation.—Failure to Complete Road.—Forfeiture.—Repeal of Statute.—Statute Construed.*—The provisions of section 2 of the supplemental act of 1873, p. 184, and the amendment of said section in 1875, R. S. 1881, section 4069, are inconsistent with the provisions of section 18 of the act of May 12th, 1869, R. S. 1881, section 4062, for the absolute forfeiture of the appropriation to a railroad company by failure to complete the work within a definite period, though the appropriation was made as a donation. *Sellers v. Beaver, 111*
2. *Same.—Subscription for Stock.*—Section 4094, R. S. 1881, does not provide for the declaring of any forfeiture for failure to complete a rail-

- road within a particular time, and there is no statute that annuls the subscription of a county or township to the stock of a railroad company simply because the road is not completed within a given time. *Ib.*
3. *Same.—Complaint.—Allegation.—“Legally Commenced.”*—An allegation that the railroad company did not legally commence work is not equivalent to an averment that the company failed to commence work upon its road within two years from the levying of the tax. *Ib.*
 4. *Injury to Cattle.—Evidence.—Venue.—Jurisdiction.*—In a suit against a railroad company for injury to cattle by cars, proof must be made that the injury occurred in the county where suit is brought.
Croy v. Louisville, etc., R. W. Co., 126
 5. *Same.—Direct Injury.*—In such a suit there must be proof of direct injury—proof that the animal was actually touched by the locomotive or cars. *Ib.*
 6. *Same.—Fences.—Private Way to Highway.*—Where a railroad company has no right by fencing in its track to exclude proprietors from their private passage to the highway, it is not liable under the statute for injury to cattle. *Ib.*
 7. *Fencing.—Cattle-Pits.*—Where a cattle-pit and wing fence are unnecessarily placed fifty feet from the line of the highway at a highway crossing, and an animal attempting to cross the railroad from the intervening space is killed by the cars, the railroad company is liable under the statute. *Louisville, etc., R. W. Co. v. Porter, 267*
 8. *Negligence.—Escape of Fire.—Complaint.*—In an action against a railroad company to recover for property destroyed by fire originating from sparks emitted by a passing locomotive, a complaint averring that the sparks emitted from the smoke-stack of the locomotive were carried therefrom “into the adjoining fields of the plaintiff, and by which the same became ignited,” is a sufficient averment of negligence on the part of the defendant in permitting the fire to escape.
Louisville, etc., R. W. Co. v. Parks, 307
 9. *Killing Animals.—Complaint.—Name.*—In a complaint against a railroad company for killing animals while operating the road of another company, it is not necessary under the statute, R. S. 1881, section 4025, to allege in what name the road was being operated.
Cincinnati, etc., R. R. Co. v. Leviston, 488
 10. *Appropriation of Land.—Trespass.—License.—Limitations.*—The right of a railroad company, given by section 3907, R. S. 1881, to enter upon lands and remain in possession during the pendency of proceedings by it to condemn lands to public use, is a license which is lost by its subsequent dismissal of the proceedings, during the pendency of an appeal therein, and thereupon it becomes a trespasser *ab initio*. And in such case certainly the plaintiff may bring his suit within a reasonable time after such dismissal, and *perhaps* the statute of limitations only then begins to run. *Pittsburgh, etc., R. W. Co. v. Swinney, 586*
 11. *Same.—Remedy.*—When a railroad company, under color of proceedings to condemn lands for public use enters, and then dismisses its proceedings, the owner may sue for trespass, and is not restricted to the remedy by writ of *Ad quod damnum* given by statute. *Ib.*

REAL ESTATE.

See DECEDENTS' ESTATES, 1; CORPORATIONS, 3; DEED; DRAINAGE; JUDGMENT, 13 to 18; MARRIED WOMAN, 2 to 4; MORTGAGE; NOTICE, 2; PARTITION; QUIETING TITLE; RAILROAD, 10, 11; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE; TRESPASS, 3; VENDOR AND VENDEE; WILLS, 1, 5.

REAL ESTATE, ACTION TO RECOVER.

See DEED, 1; JUDGMENT, 19; LANDLORD AND TENANT; MARRIED WOMAN, 4; QUIETING TITLE, 1; SHERIFF'S SALE, 1.

1. *Title and Right in Plaintiff.*—In an action for the recovery of possession of real estate, if the plaintiff fail to show title and right of possession in himself, he can not recover, even though the defendant has no title.
Deputy v. Mooney, 463
2. *Complaint.—Husband and Wife.—Deed.—Conspiring to Defraud Wife.—False Pretence.—Mortgage.—Claim of Title.—Forged Deed.—Copy.—Particulars of Adverse Title.*—A complaint, which alleges that while the plaintiff was a married woman, the defendant knowing her husband to be of weak mind, confederated with him and a justice of the peace to induce her to execute a deed to property, the legal title of which was in her husband, but the equitable title in her, of which the defendant had knowledge, under the pretence of taking a mortgage to save the land to her, and to save her husband from arrest and imprisonment, which pretence was false, and alleging that defendant had possession of the land and claimed title under a deed, which as to her was a forgery, and asking that the land be reconveyed to her and damages be adjudged for its detention, states a good cause of action against the defendant. It was not necessary to file a copy of the deed, nor was it necessary to set out the particular title claimed by other defendants who asserted title under such deed.
Carver v. Carver, 497
3. *Same.—Possession.—Quieting Title.—Widow.—Verdict.*—Where one paragraph of a complaint is for possession of real estate, and a second paragraph is to have the title quieted, and the facts alleged show the plaintiff to be entitled to claim as widow in land sold by her husband, the jury may find the plaintiff has title and is entitled to possession of one-third part thereof, and that her title be quieted as to such third, although the complaint asserts ownership in all and asks to have such title quieted.
Ib.
4. *Same.—Defence.—Evidence.*—Where, in a suit for possession, the defendants answer by denial and make defence, it is unnecessary to prove possession, and if plaintiff prove title, defendants must show rightful possession.
Ib.

RECEIPT.

See FRAUD, 2; MORTGAGE, 3.

RECEIVER.

See SUPREME COURT, 20, 21.

RECOGNIZANCE.

See SURETY OF PEACE, 2.

RECORD.

See BILL OF EXCEPTIONS; COSTS, 1; COURTS; CRIMINAL LAW, 5, 16; DECEDENTS' ESTATES, 5; JUDGMENT, 1, 5, 6; MASTER COMMISSIONER, 2; MORTGAGE, 7; RES ADJUDICATA; SLANDER, 5; SUPREME COURT, 8, 15, 16, 21, 24, 25, 30, 35, 37; SURETY OF PEACE, 1.

REDEMPTION.

See SHERIFF'S SALE, 1, 2, 7, 9, 10.

RELEASE.

See JUDGMENT, 2, 9; REPLEVIN BAIL.

RELEASE OF SURETY.

See JUDGMENT, 2; REPLEVIN BAIL.

RENTS AND PROFITS.

See SHERIFF'S SALE, 1, 2, 9, 10.

REPEAL OF STATUTE.

See MARRIED WOMAN, 2; RAILROAD, 1.

REPLEVIN.

See CHATTEL MORTGAGE.

Possessory Action.—Evidence.—Presumption.—Supreme Court.—An action of replevin is a possessory action, but where the plaintiff recovers judgment, and the evidence is not in the record, the Supreme Court will presume, in support of the judgment, that he introduced evidence tending to prove his right to the possession of the property in controversy. *Pacey v. Powell*, 371

REPLEVIN BAIL.

1. *Contract.—Terms.—Statutory Undertaking.—Effect.—Motives.*—Where a contract is one made by the parties directly, then what all agree upon constitutes its terms, but where the statute gives a certain meaning and force to an undertaking, then that meaning and that force it possesses irrespective of the motives which prompted its execution. *Baker v. Merriam*, 539
2. *Same.—Reversal of Judgment Against one.—Release of Undertaking.*—A party who becomes replevin bail upon an execution issued on a judgment against three defendants is released by the reversal of the judgment as to any one of the three judgment debtors. *Ib.*
3. *Same.—Judgment Confessed.—Principal and Surety.*—A replevin bail, in legal effect, is similar in important features to a judgment confessed for all, and not merely for a part, of the principal debt. He becomes liable for all the defendants, and they all stand to him as principals to a surety. That the request was made by one for the bail is immaterial. *Ib.*
4. *Same.—Lien.—Estoppel.*—The replevin bail is so far concluded by the undertaking that it operates as a lien from the time it is entered into, and he is so far concluded that he can not, on his own account, attack the judgment. *Ib.*
5. *Same.—Parol Evidence.—Written Contract.*—The undertaking of replevin bail can not be varied by parol evidence; it is a written contract, and is governed by the general rules applicable to other written contracts. *Ib.*
6. *Same.—Recovery of Money.—Restitution of Property.*—The undertaking of replevin bail extends only to a recovery of money, and not to the order of restitution of property. *Ib.*

REPRIEVES.

See CRIMINAL LAW, 8, 9.

RES ADJUDICATA.

See QUIETING TITLE, 1.

Evidence.—Former Recovery.—Judgment.—A record of a former suit between the same parties for the same property is competent evidence. That in the former action additional property was involved does not affect the conclusiveness of the judgment upon the property involved in the suit on trial. *Rucker v. Steelman*, 222

RESCISSION.

See CONTRACT, 1, 8, 9; SALE, 2.

RES GESTÆ.

See CRIMINAL LAW, 23.

RESTRAINT OF MARRIAGE.

See WILLS, 5.

REVIEW OF JUDGMENT.

See DECEDENTS' ESTATES, 2; JUDGMENT, 10 to 12.

SALE.

See BAILMENT; CONTRACT, 4 to 7; DECEDENTS' ESTATES, 3; INTOXICATING LIQUOR, 1; JUDGMENT, 13 to 16, 18; MORTGAGE, 7, 8; QUIETING TITLE, 4, 5; SHERIFF'S SALE.

1. *Statute of Frauds.—Delivery.*—A delivery of goods, so as to take a sale thereof out of the statute of frauds, can not be accomplished by mere words, without some act of the purchaser amounting to a receipt thereof. *Dehority v. Paxson, 253*
2. *Contract.—Rescission.—Fraud.*—To rescind a contract of sale of goods for fraud, the seller must be put in *statu quo* by a return of the goods. *Vogel v. Demorest, 440*
3. *Same.*—A written contract can not be varied by a prior or contemporaneous parol agreement. *Ib.*

SELF-DEFENCE.

See CRIMINAL LAW, 6.

SET-OFF.

See PLEADING, 7.

SHERIFF'S SALE.

See JUDGMENT, 15, 18; MARRIED WOMAN, 3, 4; QUIETING TITLE, 5.

1. *Agreement.—Fraudulent Representations.—Right to Redeem.—Sale without Appraisement.—Complaint.*—A. owned a certain lot upon which was a mortgage debt due B. The lot was sold under an execution for another debt and purchased by B., who represented to A., who was a foreigner and uninformed on the subject, that the lot was not subject to redemption unless the mortgage debt was also paid, but promised to hold the same in trust until the rents and profits paid the judgment and ten per cent. interest, and also the mortgage debt. These representations are alleged to have been false and fraudulent. Repairs being required on the premises, B. was let into partial possession and made repairs, which, by agreement, were to be included in the debt. Subsequently the lot was sold under the mortgage without relief from valuation or appraisement laws, although the mortgage did not authorize this, and the property was purchased by B., who had been let into full possession and who now claims to hold an absolute title to the property, although the time for redemption has not yet expired. It is alleged that the rents and profits since the property has been in possession of B. have more than paid both debts, interest and repairs. A. offered to pay any balance due on an account being taken, and demands judgment for any excess of payment and possession of the property. *Held*, that the paragraph of the complaint alleging these facts contains a good cause of action. *Scheffermeyer v. Schaper, 70*
2. *Same.—Statute of Frauds.—Redemption.—Agreement to Hold in Trust.*—Where a purchaser at sheriff's sale induces the owner of real estate not to redeem by a promise to hold the property until repaid out of the rents and profits, and then to return the property, the promise is not void under the statute of frauds. *Ib.*
3. *Same.—Appraisement.—Sale without Relief from Valuation and Appraisement Laws.*—Where there is no waiver of valuation and appraisement laws, a judicial sale without regard to appraisement is, at least, voidable. *Ib.*

4. *Complaint to Set Aside.—Preventing Bids.*—A complaint to set aside a sheriff's sale of land, on the ground that the purchaser prevented others from bidding, is not good unless it also avers that the land was sold for less than its value, or unless it is averred that more land was sold than was necessary to pay the judgment. *Lynch v. Reese, 360*
5. *Same.—Sale by Parcels.—Discretion of Sheriff.*—Where the land sold consists of a single parcel, its division rests largely in the discretion of the sheriff, and where it does not appear that such discretion has been abused, the sale will not be disturbed on such ground. *Ib.*
6. *Same.—Abuse of Discretion.*—The facts which tend to show abuse of discretion must be averred, and it is not enough to merely aver that such land was susceptible of division. *Ib.*
7. *Same.—When Action may be brought to Set Aside Sale when Bidding was Prevented.*—When a purchaser of land at sheriff's sale induces others not to bid, and thus procures the land for less than it is worth, the sale will be set aside, and this will be done though the action is not instituted until after the year of redemption has expired. *Ib.*
8. *Same.—Fraud.—Statute of Limitations.*—Such action is based upon the fraudulent conduct of the purchaser, and may be brought at any time within the statute of limitations. *Ib.*
9. *Non-Redemption from Sale.—Sheriff's Deed.—Intervening Judgment.*—Where real estate is sold by the sheriff upon execution or order of sale, and, upon the non-redemption of the real estate from such sale within the year allowed by law therefor, a sheriff's deed is executed to the holder of the sheriff's certificate of sale, such deed will relate back to and take effect from the date of the sheriff's sale, so as to convey the real estate free from the lien of an intervening judgment against the execution debtor. *Wilhelm v. Humphries, 529*
10. *Same.—Right to Redeem.—Lien of Judgment.—Accounting for Rents and Profits.*—Where a judgment debtor has a naked right to redeem certain real estate, by the payment of a certain sum of money, the lien of the judgment, if any, on such right to redeem, will not entitle the judgment plaintiff to demand from the owner of the fee, in such real estate, an accounting for rents and profits thereof. *Ib.*
11. *Suit to Set Aside.—Complaint.—Notice.—Execution.—Resident Householders.—Sheriff.—Order of Sale.*—A complaint to set aside a sheriff's sale of real estate, on the ground that it was exempt from execution, as the property of a resident householder, as provided by section 703, R. S. 1881, is fatally defective if it does not allege that the schedule required by sections 713 and 714, R. S. 1881, and which he delivered to the sheriff, contained a list of all his property at the date of the issuing of the writ. *Guerin v. Krueger, 535*
12. *Same.—Complaint.—Notice.—Sheriff.—Execution.—Provisions by Statute.—Presumption.*—While statutes relating to exemptions must be liberally construed, a party claiming a specific remedy by reason of the denial of his right by an officer acting in discharge of his duty, must show that he has substantially complied with the provisions of the statute entitling him to claim the exemption; otherwise the presumption will be that the officer performed his duty. *Ib.*
13. *Same.—Pleading.—Facts not averred.*—It should be averred in a pleading an allegation in the complaint that the plaintiff complied with all the statutory provisions entitling the property to exemption, without specific averments is not sufficient. *Ib.*
14. *Same.—Execution.—Notice.—Return of Property or Execution to Sheriff.*—An execution in the sheriff's name that the sheriff did not serve the writ or the execution defendant is not returnable unless there be an allegation that he had other property which he would have designated,

and is still ready to turn out, or that he was prepared to pay the money on the writ. *Ib.*

15. *Same.—Announcement at Sale.—Claim of Execution Defendant.*—An announcement by the sheriff at the sale, that whoever purchased the property would take it subject to a lawsuit by the execution defendant and subject to any claim he had upon it, was matter a prudent bidder would consider without such announcement, and would not avoid the sale. *Ib.*

SIGNATURE.

See DEED, 7.

SLANDER.

1. *Statute of Limitations.—Instructions.—Commencement of Action.*—An instruction, in an action of slander, informing the jury that the cause is not barred if the actionable language was spoken within two years before the complaint is filed, is not erroneous, when the writ was issued on the same day that the complaint was filed, as the action has then commenced. *Belck v. Belck, 73*
2. *Same.—Instruction.—Malice.*—If, in such case, no excuse was shown, or if the language was spoken with malice in fact, an instruction to find for the plaintiff, if the language is found to have been spoken as alleged, was correct. *Ib.*
3. *Same.—Presumption.*—Where the language spoken is actionable *per se*, and no legal excuse or justification is shown, the law presumes malice. *Ib.*
4. *Same.—Measure of Damages.*—An instruction to the jury, in such a case, that there is no legal rule governing the assessment of damages, is strictly correct, as these must be determined by them, in the exercise of a wise discretion, under all the circumstances of the case as disclosed by the evidence. *Ib.*
5. *Same.—Evidence.*—A general direction to assess such damages as the jury think right, without any direction as to the rules of law by which they are to be governed, can not be approved, but where the evidence is not in the record, and it may have shown a wanton and malicious injury, the jury were not limited in their assessment unless it indicated corruption or partiality, and, as this is not claimed, such instruction will not authorize the reversal of the judgment. *Ib.*
6. *Words Actionable.—Public Indecency.*—Words, which in their common acceptation, taken as a whole, charge the crime of public indecency as defined by the statute, are actionable *per se*. *Seller v. Jenkins, 430*
7. *Same.—Slandorous Words.*—In order that words should be slanderous, it is not necessary that they should describe the offence with technical accuracy; it is sufficient if the words uttered are such as convey to the minds of the hearers an imputation of a crime. *Ib.*
8. *Same.—Words.—Provincial Meaning.—Pleading.*—Where words have a provincial meaning, that meaning must be averred as a substantive fact, and the ordinary meaning of words can not be changed by a mere innuendo. *Ib.*

SPECIAL FINDING.

See VERDICT, 1 to 3.

STARE DECISIS.

Overruled Cases.—A decision of the Supreme Court afterwards overruled is not a general rule of property even as to purchases made on the faith of it before it was overruled. It is only the law of that case binding the parties to it, and those claiming under them, as to the matters involved in that suit. *Hibbitts v. Jack, 570*

STATUTE CONSTRUED.

See CITY, 9, 11; CORPORATION, 2; COSTS, 2; COURTS, 1; CRIMINAL LAW, 29; DECEDENTS' ESTATES, 1, 2, 5; DRAINAGE, 16, 17, 22, 25; EXECUTION, 1; INTOXICATING LIQUOR, 1; MARRIED WOMAN, 3; NOTICE, 2; PROMISSORY NOTE, 2 to 5; RAILROAD, 1 to 3; SHERIFF'S SALE, 11, 12; TRESPASS, 2; VOLUNTARY ASSIGNMENT; WILLS, 5.

Construction of Forfeitures.—Statutes providing for forfeitures are to be strictly construed. *Sellers v. Beaver, 111*

STATUTE OF FRAUDS.

See SALE, 1; SHERIFF'S SALE, 2.

STATUTE OF LIMITATIONS.

See MARRIED WOMAN, 4; RAILROAD, 3; SHERIFF'S SALE, 8; SLANDER, 1.

STATUTE REPEALED.

See MARRIED WOMAN, 2; RAILROAD, 1.

STOCKHOLDER.

See CORPORATION, 2; RAILROAD, 2.

STREETS.

See CITY, 11.

STREET COMMISSIONER.

See CITY, 9, 10.

SUBROGATION.

See MORTGAGE, 7.

SUMMONS.

See SUPREME COURT, 24.

SUPERINTENDENT OF ROADS.

See HIGHWAY.

SUPREME COURT.

See BILL OF EXCEPTIONS; CONTINUANCE, 1; COSTS; COURTS, 2, 3; CRIMINAL LAW, 5, 9, 15, 16, 25 to 28; DECEDENTS' ESTATES, 5, 12; HABEAS CORPUS, 1; INSTRUCTIONS TO JURY, 2; INTERROGATORIES TO JURY, 2; JUDGMENT, 7; PRACTICE, 1 to 4; SLANDER, 5; STARE DECISIS.

1. *Assignment of Errors.*—*Waiver.*—A specification in an assignment of error, not discussed in brief, is treated as waived.

Western, etc., Co. v. Kilpatrick, 42

2. *Same.*—*New Trial.*—The action of the court below in granting a new trial will not be reviewed unless it plainly appears that injustice has been done. *Ib.*

3. *Same.*—*Instructions.*—Giving or refusing instructions can not be assigned as error, but is properly embraced in a motion for a new trial. *Ib.*

4. *Same.*—*Verdict.*—*Evidence.*—If there be evidence tending to sustain the verdict, the Supreme Court can not consider its sufficiency. *Ib.*

5. *Weight of Evidence.*—The Supreme Court will not disturb the finding of the court upon a question of fact where the evidence is conflicting.

Robinson v. Snyder, 56; Frenzel v. Bradbury, 603

6. Where the evidence is not in the record, an instruction will not be deemed erroneous if proper under any supposable state of facts.

Belck v. Belck, 73

7. *Motion.*—*Assignment of Error.*—*Bill of Exceptions.*—Unless the grounds of the motion mentioned in a specification under an assignment of errors

- appear in the bill of exceptions, no question can be made in the Supreme Court upon the ruling on the motion. *Ross v. Davis*, 79
8. *Correction of Record.—Certiorari.*—The settled practice of the Supreme Court forbids the correction of the record after a case has been decided. *State v. Dixon*, 125
 9. *Evidence.—Exceptions Waived.*—Where the questions put to a witness under examination and excepted to are not the ones discussed on appeal in the Supreme Court, the exceptions are considered as waived. *Cook v. Woodruff*, 134
 10. *Same.—Instructions.—Exceptions to Special.*—Where the instructions given, considered together, are full, complete and without contradiction, and contain a fair exposition of the law as applicable to the case, objections to one or more of them taken separately will not be considered. *Ib.*
 11. *Same.—Verdict.—Evidence.*—When there is evidence clearly tending to support the verdict, it will not be disturbed on the evidence alone. *Ib.*
 12. *Same.—New Trial.*—Where error is assigned upon the overruling of a motion for a new trial, and the grounds stated in the motion are excessive damages, insufficient evidence, finding contrary to law, and error in admitting testimony, and there is no bill of exceptions filed, no question is presented. *Borchus v. Huntington, etc., Association*, 180
 13. *Same.—Time of Trial.*—Where it appears from the whole record that there was no meritorious defence, there is no available error in the trial of the cause before the day set for its trial. *Fitch v. Citizens, etc., Bank*, 211
 14. *Evidence.—Exception.*—A party, claiming a reversal because of the exclusion of evidence, must show what the evidence was, that the question of its competency and materiality may be determined. *Rucker v. Steelman*, 222
 15. *Practice.—Amended Complaint.—Record.—Assignment of Error.*—Where an amended complaint by the appellant is filed in the court below, no question can be raised in the Supreme Court as to whether or not it is properly a part of the record, unless a motion was made to strike it out, the grounds therefor being stated, and such ruling assigned as a cross error. *Merritt v. Richey*, 236
 16. *Clerk's Certificate to Transcript.*—Where the clerk's certificate, properly worded and authenticated, shows that all the papers in the case, ordered by the appellant, are embodied in the transcript, and these papers indicate on their face that the transcript is full, correct and complete, the certificate is sufficient. *Boots v. Griffiths*, 241
 17. *Instructions.—Evidence.—Harmless Error.*—An erroneous instruction, which, in view of the evidence, could not injure, is not available error. *Dehority v. Parson*, 253; *Louisville, etc., R. W. Co. v. Porter*, 267
 18. *Evidence.—Excessive Damages.*—Where the evidence is conflicting, the verdict will not be disturbed by the Supreme Court on what might seem to be the weight of the evidence; nor will the judgment be reversed by the Supreme Court, on the ground of excessive damages, unless they appear at first blush to be grossly excessive. *Evansville v. Worthington*, 282
 19. *Evidence.—Record.*—Where the complaint is not in the record, the court can not say that the evidence supported it, and, therefore, can not say that a finding for the defendant was contrary to the evidence. *Seager v. Aughe*, 285
 20. *Exception.—Receiver.*—Where no exception is taken to a judgment appointing a receiver, the matter can not be questioned in the Supreme Court. *Cottrell v. Aetna L. Ins. Co.*, 311
 21. *Transcript.—Motion.—Bill of Exceptions.*—A motion to discharge a re-

- ceiver, which is not copied into the bill of exceptions, but appears elsewhere in the record, and a reference thereto is made at the proper place in the bill, is not properly in the record. *Ib.*
22. *Instruction.—Harmless Error.*—An erroneous instruction, if harmless, will not warrant a reversal of the judgment. *Froun v. Davis, 401*
23. *Instructions.—Evidence Supporting Verdict.*—Where all the instructions taken together fairly present the law to the jury, a single inaccurate instruction will not authorize a reversal of the judgment. Where the record affirmatively shows that the verdict was right upon the evidence, the judgment will not be reversed for error in the instructions. *Stockwell v. Brant, 474*
24. *Record.—Bill of Exceptions.—Summons.*—Where all the defendants appear, the summons and return can only be brought into the record by bill of exceptions or special order; so, also, a pleading which has been struck out, and instructions given or refused which do not appear to have been filed. *Cincinnati, etc., R. R. Co. v. Heim, 525*
25. *Same.—Practice.—Verdict.—Interrogatories.*—Unless it appears by the record that the court has sent interrogatories to the jury, the answers thereto will not be considered by the Supreme Court. *Ib.*
26. *Assignment of Error.—Waiver.*—An assignment of error is waived by the failure of appellant's counsel to discuss the question. *Maddox v. Maddox, 537*
27. *Errors Waived.*—The Supreme Court will consider only the alleged errors discussed; all others are deemed waived. *Daniels v. McGinnis, 549*
28. *Erroneous Instructions.—Harmless Error.*—Where it appears "that the merits of the cause have been fairly tried and determined in the court below," the judgment will not be reversed, although one or more of the instructions of the court to the jury may have been erroneous. *Ib.*
29. *Misjoinder of Causes.*—The statute, section 341, R. S. 1881, forbids in any case a reversal for overruling a demurrer to a complaint for misjoinder of causes of action. *Pittsburgh, etc., R. W. Co. v. Swinney, 586*
30. *Bill of Exceptions.—Record.—Evidence.*—When time is given beyond the term to file a bill of exceptions, and the record fails to show when it was presented to the judge, or when it was filed, it can not be considered as part of the record. *Horner v. Hoadley, 600*
31. *Instructions.—Exceptions.—Waiver.*—Where no exception to the refusal of the court to give instructions in writing is taken at the time, the objection thereto is regarded as waived. *Ib.*
32. *Assignment of Errors.*—That the report of the drainage commissioners is not according to law is not a sufficient assignment of error. *Ross v. Davis, 79*
33. *Instructions.—Exceptions.*—The action of the court in giving instructions presents no question unless the objection is saved by an exception. *Lowell v. Gathright, 313*
34. *New Trial.*—A cause for a new trial is not taken as true, and will not be considered by the Supreme Court unless the truth of the facts, assigned as such cause, is shown by bill of exceptions. *Sweetser v. McCrea, 404*
35. *Replevin.—Possessory Action.—Evidence.—Presumption.*—An action of replevin is a possessory action, but where the plaintiff recovers judgment, and the evidence is not in the record, the Supreme Court will presume, in support of the judgment, that he introduced evidence tending to prove his right to the possession of the property in controversy. *Pacey v. Powell, 371*
36. *Instructions.—Presumption.*—Where instructions given by the court are

not in the record, it will be presumed that the court gave general instructions covering the issues in the case. *Ricketts v. Coles, 602*

37. *Affidavits.—New Trial.*—Affidavits in support of a motion for new trial on account of newly discovered evidence must be made a part of the record by bill of exceptions or order of court. *Hodgson v. Board, etc., 604*

SURETY OF PEACE.

1. *Record of Justice.—Parol Evidence.*—In a proceeding before a justice of the peace to obtain surety of the peace, the record of the justice of the acts and things done by and before him, in such proceedings, is not conclusive, and may be contradicted by parol evidence. *Smelzer v. Lockhart, 315*
2. *Same.—Finding of Justice.—Judgment.—Habeas Corpus.*—In such a proceeding the action of the justice in requiring the defendant to enter into the recognizance required by section 1610, R. S. 1881, or, in default of such recognizance, in committing him to the county jail until discharged by due course of law, is not a "final judgment of a court of competent jurisdiction," within the meaning of the *second* clause of section 1119, R. S. 1881, which forbids an inquiry into the legality of the judgment or process whereby such defendant is in custody, or his discharge therefrom, under a writ of *habeas corpus*. *Ib.*
3. *Same.—Criminal Prosecution.—Change of Venue.—Bias or Prejudice of Justice.*—A proceeding before a justice to obtain surety of the peace is a criminal prosecution, not for the punishment, but for the prevention of crime; and in such a prosecution, when affidavit is made before the justice by the defendant, that he can not have an impartial trial before such justice on account of his interest, bias or prejudice, at any time before the trial is commenced, and a change of venue is demanded, the justice has no discretion, but it becomes and is his imperative duty to grant such change of venue, and his subsequent proceedings in the case are *coram non judice* and void. *Ib.*
4. *Issue.—Pleading and Proof.—Bond.*—While the affidavit in proceedings for surety of the peace must state that it is made "only to secure the protection of the law, and not from anger or malice," yet the only issue for trial is whether the complainant had just cause for the fears stated, when the affidavit was filed, and if it be found affirmatively in the circuit court, surety must be required though such cause may then have ceased. *Stone v. State, ex rel., 345*
5. *Same.—Evidence.—Witness.*—In such case the affidavit and record of the defendant's conviction of an attempt to provoke an assault are not admissible for the defendant, such affidavit being in the general language of the statute and made by the complainant, and he having stated, as a witness, that he caused the prosecution. *Ib.*

SURPRISE.

See NEW TRIAL, 1.

TAXES.

See QUIETING TITLE, 1; RAILROAD, 1 to 3.

1. *Complaint to Set Aside Sale.—Tender.*—A complaint to set aside a sale of land for taxes, and to cancel the certificate of purchase, on the ground that the plaintiffs have tendered the amount of the taxes and the interest thereon to the purchaser, is insufficient upon demurrer, unless the plaintiffs also bring the money into court, or offer to pay it to the purchaser upon obtaining the relief demanded. *Lancaster v. DuHadway, 565*
2. *Same.—Deed.—County Auditor.—Injunction.—Legal Disability.—Infant.*—The auditor of the county has authority to execute a conveyance of land sold for taxes, at the expiration of two years from the time such

sale was made, though such lands belong to persons under disabilities, and, therefore, he can not be enjoined from executing such deed unless the lands are redeemed from such sale. *Ib.*

TELEGRAPH.

See PLEADING, 3.

TENDER.

See TAXES, 1.

TIME.

See CITY, 10; CONTRACT, 4; PLEADING, 2, 3; PROMISSORY NOTE, 6.

TITLE.

See CORPORATIONS, 3; DEED, 4, 8; EVIDENCE; JUDGMENT, 15, 18; PARTITION, 1, 4; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE, 1; VENDOR AND VENDEE.

TRANSCRIPT.

See BILL OF EXCEPTIONS; DECEDENTS' ESTATES, 5; JUDGMENT, 5, 18; QUIETING TITLE, 5; SUPREME COURT, 16, 21.

TRESPASS.

See DECEDENTS' ESTATES, 13 to 15; RAILROAD, 10, 11.

1. *Malicious Trespass.—Killing Dog.—Animals.—Complaint.*—In an action for maliciously and unlawfully killing a dog, while the act requiring dogs to wear a collar and metallic tag, R. S. 1881, sections 2647–2651, was in force, it is unnecessary to aver in the complaint that such dog was wearing such collar and tag. *Lowell v. Gathright, 313*
2. *Same.—Statute Construed.*—The provisions of said sections conferred no authority upon any person other than an officer to kill a dog without collar and tag, unless such dog was running at large. *Ib.*
3. *Real Estate.—Measure of Damages.—Interest.*—In ascertaining the damages for a trespass to lands and removing material therefrom, the jury may, in their discretion, add to the value of the material taken interest thereon at six per cent. per annum, without finding, as in suits on contract, that there has been unreasonable delay of payment. *Pittsburgh, etc., R. W. Co. v. Swinney, 586*

TRIAL.

See CRIMINAL LAW, 29; DRAINAGE, 11; MANDAMUS; SUPREME COURT, 13.

TRUST AND TRUSTEE.

See DECEDENTS' ESTATES, 3, 15; SHERIFF'S SALE, 1, 2.

ULTRA VIRES.

See CITY, 1, 3; INSURANCE, 2.

VENDOR AND VENDEE.

See DEED, 4; EVIDENCE; FRAUDULENT CONVEYANCE; INJUNCTION; MORTGAGE, 3, 6, 7.

1. *Deed.—Breach of Covenant.—Purchase-Money.—Eviction.—Surrender of Possession.—Nominal Damages.*—Where possession of real estate is taken under a deed, the payment of the purchase-money can not be defeated without showing an eviction or surrender of possession to the owner of a paramount title. The breach of the covenant gives a right to nominal damages, but a judgment will not be reversed for a failure to award them. *Wimberg v. Schwegeman, 528*
2. *Same.—Injunction.—Equity.—Insolvency.*—An injunction may, in a proper case, be granted to restrain the collection of the purchase-money of real estate, where covenants are broken by the total failure

of title, but where the grantee is in possession, he must show some equity entitling him to resort to this extraordinary remedy. One of the facts that must be shown is the insolvency of the grantor. *Ib.*

VENDOR'S LIEN.

See MORTGAGE, 7.

VENIRE DE NOVO.

See CRIMINAL LAW, 21.

VENUE.

See CHANGE OF VENUE; RAILROAD, 4.

VERDICT.

See INSTRUCTIONS TO JURY, 2; INTERROGATORIES TO JURY; JUDGMENT, 8; REAL ESTATE, ACTION TO RECOVER, 3; SUPREME COURT, 4, 11, 23, 25.

1. *Interrogatories to Jury.—Special Findings.—General Verdict.*—In order that the special findings of a jury in answer to interrogatories may control the general verdict, they must be irreconcilably inconsistent therewith. *Croy v. Louisville, etc., R. W. Co., 126*

2. *Same.—Material Facts.*—In order to entitle the plaintiff to a judgment on the special findings notwithstanding the general verdict, all material facts must appear in the finding. *Ib.*

3. *Special Finding.—Burden of Issue.—Material Facts.*—A party who has the burden of the issue can not have a judgment unless all the facts essential to a recovery are stated in the special finding or verdict. *Yerkes v. Sabin, 141*

4. *Construction.*—A verdict, however informal, is good if the court can understand it. Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity. If rendered upon substantial issues of fact, fairly presented by the pleadings, they should not be disturbed on account of mere technical defects. *Daniels v. McGinnis, 549*

VOLUNTARY ASSIGNMENT.

Benefit of Creditors.—Preferences.—Fraud.—Statute Construed.—Section 2662, R. S. 1881, only provides for a general assignment of all a debtor's property for the benefit of all his creditors, and when that is attempted the statute must be complied with; but assignments by a debtor for the benefit of a part of his creditors, in order to be held void, must be actually fraudulent. This statute does not prevent preferences in good faith of one creditor over another. *Cushman v. Gephart, 46*

WAIVER.

See BILL OF EXCEPTIONS, 1; CRIMINAL LAW, 12, 13, 29; DECEDENTS' ESTATES, 8; DRAINAGE, 18; INSURANCE, 2; JUDGMENT, 12; MASTER COMMISSIONER, 3; PROMISSORY NOTE, 9; SHERIFF'S SALE, 3; SUPREME COURT, 1, 9, 26, 27, 31.

WAREHOUSEMAN.

See BAILMENT.

WATERCOURSE.

See HIGHWAY.

WIDOW.

See DECEDENTS' ESTATES, 1, 5; MARRIED WOMAN, 4; MORTGAGE, 8; REAL ESTATE, ACTION TO RECOVER, 3; WILLS, 1, 5.

WILLS.

See DECEDENTS' ESTATES, 4.

1. *Construction.—Widow.—Descents.*—A will gave to the wife of the testator all his property, real and personal, to use, sell and dispose of as she might see fit, "for her own comfort and convenience," with power to convey the real estate in fee simple if her necessities or comfort require it. A subsequent clause directed that the residue of his "property or

moneys, if any should be left after her death and full payment of her funeral expenses, be equally divided between" his children, of whom there were two only, the fruit of a former marriage.

Held, that any of the property undisposed of and not consumed by the wife went, at her death, to the children, save enough to discharge her funeral expenses.

Held, also, that she could not dispose of such property by will.

John v. Bradbury, 263

2. *Schedule.—Identification.*—A schedule signed by a witness to a will can not be regarded as part of the will, unless it is in some way identified.

Fickle v. Snapp, 289

3. *Same.—Promissory Notes.—Identification in Will.*—Where notes, payable at the death of the testator, were folded up with his will and remained in his possession at the time of his death, and were clearly and fully identified, they formed part of the will. *Ib.*

4. *Same.—Delivery of Notes.*—It was not important that there had been no delivery of the notes. Their existence as a writing of a character that could be incorporated in the will, and their identification, satisfy all requirements. *Ib.*

5. *Bequest to Wife.—Limitation.—Restraint of Marriage.—Descents.—Heirs.—Statute Construed.*—A devise of lands to the testator's wife "so long as she shall remain my widow" contains no condition in restraint of marriage, within the meaning of section 2567, R. S. 1881, but a mere limitation, and if she marry, or, not marrying, dies, the land goes to the heirs in the absence of a devise over. *Hibbits v. Jack*, 570

WITNESS.

See CRIMINAL LAW, 12, 13, 15; INTOXICATING LIQUOR, 3; MORTGAGE, 4, 5; NEW TRIAL, 1; SUPREME COURT, 9; SURETY OF PEACE, 5.

1. *Evidence.—Witness.—Impeachment.*—A witness may be contradicted by evidence showing that he has made statements directly relevant to the subject-matter of the action, contradicting the testimony given on the witness stand, but he can not be impeached by contradiction upon merely collateral matters. *Seller v. Jenkins*, 430
2. *Same.—Effect of Evidence of Contradictory Statements.*—Evidence of contradictory statements extends no further than the question of credibility; it does not tend to establish the truth of the matters embraced in the contradictory statements. *Ib.*
3. *Same.—Cross-Examination.*—A witness may be impeached upon statements made by him on cross-examination, when such statements are not as to merely collateral matters. *Ib.*
4. *Same.—Degree of Contradiction between Statements out of Court and Testimony in Court.*—There must be contradiction between the statements out of court and the testimony of the witness, in order to make the impeaching evidence competent, but the degree of contradiction does not determine the competency of the impeaching evidence. *Ib.*

WORDS AND PHRASES.

See CONSTITUTIONAL LAW; SLANDER, 6 to 8.

WRITTEN INSTRUMENT.

See FRAUD, 2; PLEADING, 8, 11.

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